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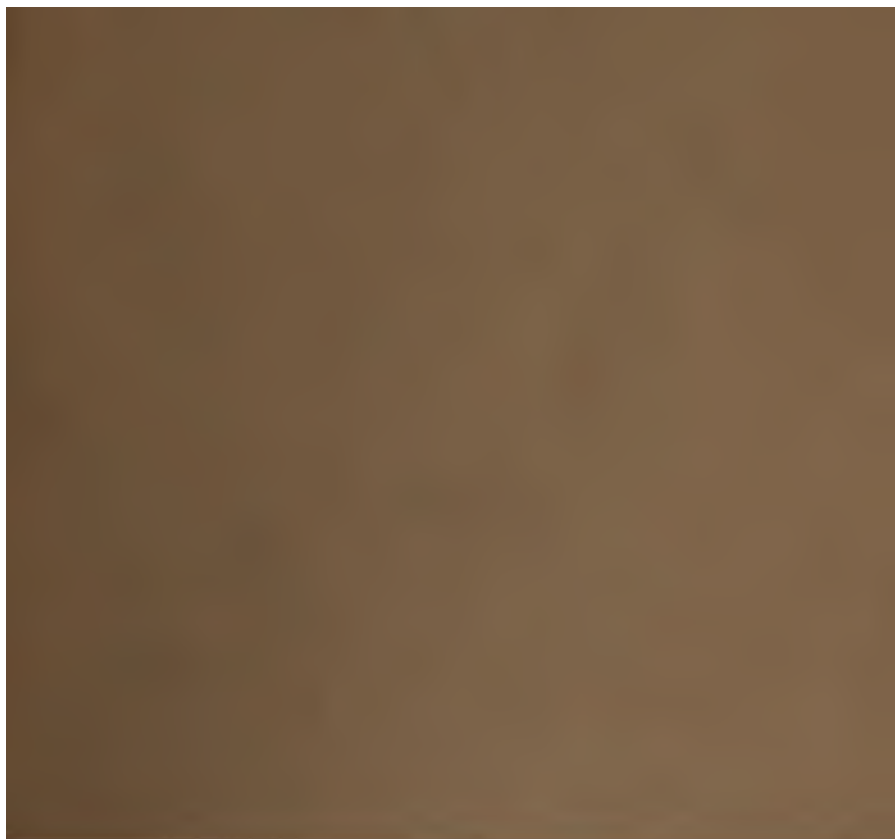
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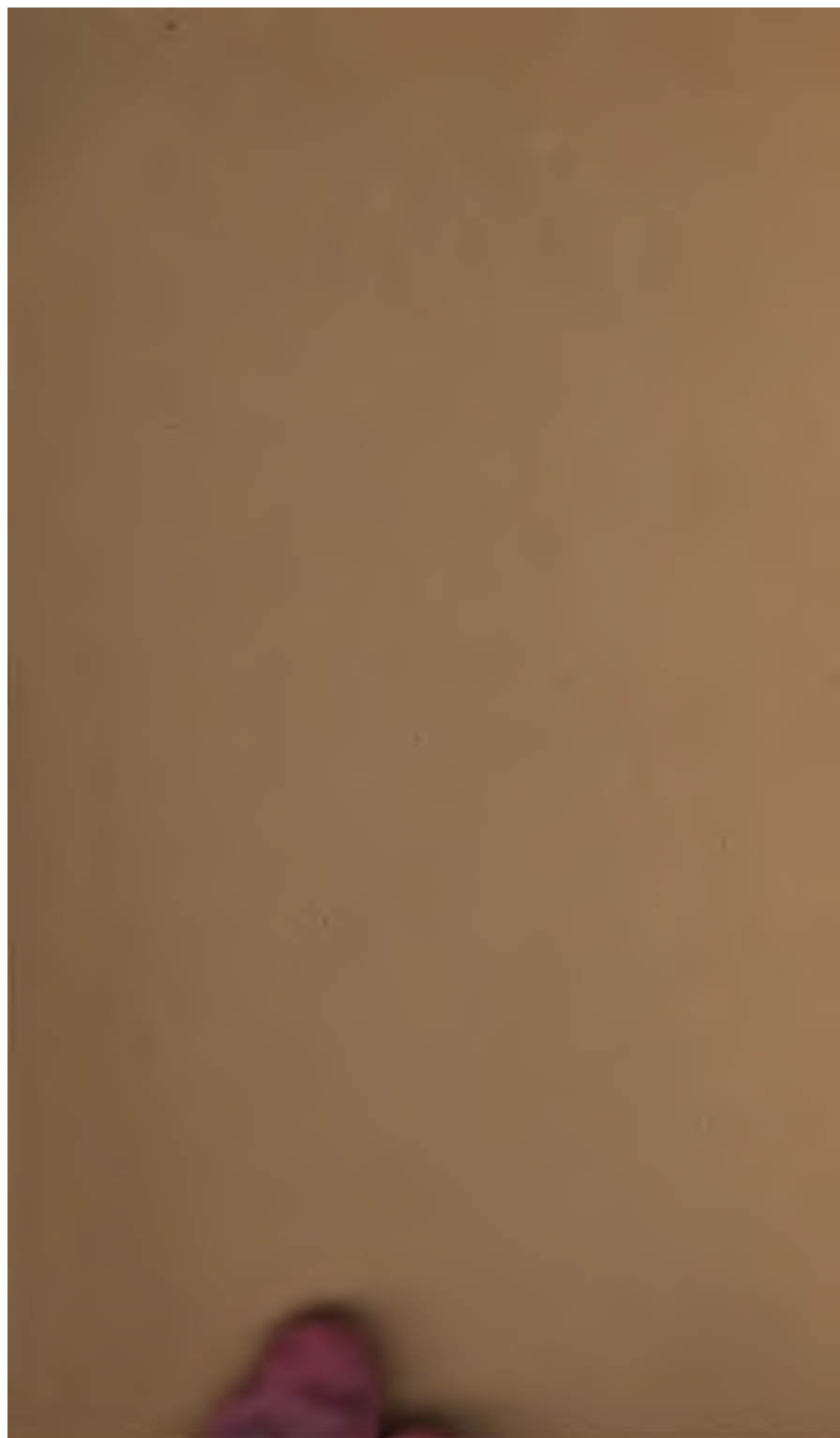
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6

**INSTITUTES**  
**OF**  
**INTERNATIONAL LAW.**

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**BY**  
**RICHARD WILDMAN, Esq.,**  
**OF THE INNER TEMPLE, BARRISTER AT LAW;**  
**RECORDER OF NOTTINGHAM, &c.**

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**VOL. I.**

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**IN**  
**TIME OF PEACE.**

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TO

**LORD DENMAN,**

**LATE CHIEF JUSTICE OF ENGLAND,**

**IN TESTIMONY OF RESPECT FOR AN ILLUSTRIOUS NAME,**

**THE FOLLOWING PAGES ARE INSCRIBED**

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## ADDENDUM.

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To p. 8, n. (b), *add* Grot. ii. 5, xxxii.—iii. 7; Buron v. Denman,  
2 Exch. Rep. 163.

# INSTITUTES

OF

## INTERNATIONAL LAW.

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### CHAPTER I

#### OF THE NATURE AND SOURCES OF INTERNATIONAL LAW.

INTERNATIONAL law is the customary law, which determines the rights and regulates the intercourse of independent states in peace and in war. As Grotius defines it: it is the law, which obtains between sovereigns, founded on custom and implied compact (*a*). And in another place, the law that has sprung up amongst all or many states from mutual consent; and again, the unwritten law which the consent of nations hath established (*b*).

An examination of the several parts of this definition will serve to shew the limits of the subject, and the divisions, of which it is capable. The first branch of it excludes from its subject every thing, which is not of the nature of law. Hence neither do treaties form any part of its elements; nor do the rules of abstract propriety, which are commonly called the law of nature.

(*a*) Proleg. 1. *Jus illud quod inter populos plures aut populorum rectores intercedit moribus et pacto tacito introductum.*

(*b*) Proleg. 17, 26. *Jura inter civitatis aut omnes aut plerasque ex consensu nata. Jura non scripta quæ gentium consensus constituit.*

1st. International rights are either derived from the common law of nations, or are acquired by treaty. Treaties or the contracts of nations are recognized and enforced by international law; but they no more form part of it, than the contracts of private persons form part of the municipal law, by which they are enforced (*c*). We must take care not to confound those rules, which properly belong to the law of nations; with those, which are founded upon the municipal laws of states, or upon their treaties (*d*). Treaties are declaratory of international law, so far as they imply or set forth its principles; but in derogation of it between the contracting parties; so far as their legal rights are varied by their mutual stipulations. The common law of nations can only be deduced from reason and usage. Usage is derived from the perpetual current of decisions and treaties. Treaties, that depart from the custom, do not alter the law of nations (*e*). By a confusion of terms they have been styled conventional law, which is but another term for the law of nations; but they are in truth conventional obligations recognised by law.

2ndly. The law of nature forms no part of international law. The term is borrowed from the Roman lawyers, who seem to have divided it into primary and secondary (*f*). The primary law according to them consisted of those instincts, which are common to all animals, as natural affection and the like. The secondary law consisted of those institutions, which natural reason has established amongst all mankind; and it was also

(*c*) Puff. ii. 3, xxiii.

(*d*) Grot. iii. 2, vii. Cavendum est ne confundamus ea, quæ juris gentium sunt proprie: et ea quæ jure civili aut pactis populorum constituuntur.

(*e*) Jus gentium commune, non aliter licet discere, quam ex ratione et usu. Usus intelligitur ex perpetuâ quodammodo paciscendi edicendique consuetudine. Dixi ex perpetuâ quodammodo consuetudine, quod unum forte alterumvi pactum, quod a consuetudine recedit, jus gentium non mutat. Bynk. Q. J. P. x.

(*f*) Ff. i. 1, 3; Inst. 1, 2, i.

called the law of nations, as being common to all nations respectively in their several capacities (*g*). In the same sense the feudal system hath been designated the law of nations of the western world.

The *jus gentium* was a branch of private law. *Publicum jus est, quod ad statum rei Romanæ spectat: privatum, quod ad singulorum utilitatem: sunt enim quædam publice utilia, quædam privatim. Privatum jus tripartitum est: collectum etenim est ex naturalibus præceptis, aut gentium, aut civilibus. Ex hoc jure gentium introducta bella; discretæ gentes, regna condita: dominia distincta: agris termini positi: adificia collocata: commercium: emptiones venditiones; locationes conductiones; obligationes institutæ, exceptis quibusdam, quæ a jure civili introductæ sunt* (*h*). The two phrases *jus naturæ* and *jus gentium* are used by the Roman lawyers almost indiscriminately (*i*). A misapprehension of what they understood by *jus gentium* has led to important errors, which will be noticed hereafter.

The law of nature in its modern signification means nothing more than natural justice and equity, or the rules of abstract propriety. This was one of its significations in the Roman law. *Jus pluribus modis dicitur, uno modo, cum id, quod semper æquum et bonum est, jus dicitur; ut est jus naturale* (*j*). It is understood by Grotius in the same sense; *bonum et æquum, id est rerum naturæ jus* (*k*). So Bynkershoek observes in speaking of Sallust's remarks on the execution of Bomilcar: his observation shews, that the rule of the law of nations which required that Bomilcar should be dismissed with impunity, was not agreeable to those notions of equity and right; which men,

(*g*) Grot. ii. 3, v.; ii. 8, xxvi.; iii. 2, vii; Proleg. 53; Gravin. Orig. 2, xi.; Domat. Tr. des Loix, xi. 39, 44.

(*h*) Ff. i. tit. 1.

(*i*) Barbeyrac ad Grot. ii. 8, i.

(*j*) Ff. i. tit. 1.

(*k*) ii. 18, iv. §. 3.

especially those who have no knowledge of law, frame for themselves; and which demand the punishment of all offenders without distinction of persons (*l*); and again, the law of nature knows no distinction of persons or territories or states; those distinctions are to be learned from the law of nations (*m*). The law of nature creates duties of imperfect obligation, which if denied can not lawfully be enforced (*n*). Imperfect rights is the correlative term used by writers of the law of nature (*o*). But it is difficult to conceive a right which is without a remedy, and which can not be enforced without wrong, because the person upon whom the imperfect duty rests, is not bound to allow it. The phrase moral claim at once conveys the idea which Puffendorf and Vattel have employed countless pages to confuse.

It is obvious that such rules can impose no legal obligation until they are sanctioned by usage or legislative authority, and thus pass into law. Wanting that sanction they bear, when applied to international transactions, the same relation to international law, that the duties of private charity bear to the obligations of municipal law. They are fit to inform the conscience of statesmen, but not to define international rights (*p*). It is true, that if sovereigns and statesmen were always guided by natural equity, if they were sufficiently enlightened to feel, that plain good intention is of no mean force in the successful conduct of affairs; that a scrupulous regard for the rights of others attracts more influence to a state than all the refinements

(*l*) Bynk. F. L. xviii. Ostendit, quamvis religio juris gentium Bomilicarem dimittendum suaderet, id tamen displicuisse ex æquo et bono: quod homines præsertim juris imperitiores sibi fingunt, et hic fingebant: quodque videbatur flagitare, ut nullo personarum discrimine delictum poena sequatur.

(*m*) F. L. xxiv. Jus naturæ nec homines distinguit nec dominia nec imperia: jus gentium distinguere docuit.

(*n*) Vatt. Prelim. 17, l. i. 91, ii. 10.

(*o*) Vatt. Prelim. 17.

(*p*) Vatt. iii. 189; Prelim. 10.



of fraud, which are sure to be exposed at last; the law of nations, *jura inventa metu injusti*, would be needless (*q*). But until the reign of Saturn returns the law of nature, which cannot lawfully be enforced (*r*), must be supplied by the law of nations and the obligations of treaties.

The confusion of the law of nature and the law of nations was foreseen by Grotius as likely to arise from a misconception of the terms of the Roman law. Where the term "law of nations" is met with in the writings of Roman lawyers, it must not at once be construed to mean that law, which is immutable: but care must be taken to distinguish natural precepts from those which are natural only under certain circumstances; and those laws which are common to many states in their several capacities, from those which constitute the bond of human society (*s*). Again, the Roman lawyers enumerate many modes of acquiring property, which they ascribe to the law of nations. But a careful examination of them will shew: that, with the exception of acquisitions *jure belli*, they all belong either to the law of nature not in its primary but in its secondary signification; or else to municipal law so far as it was not peculiar to the Romans, but common to them and to all neighbouring states. But this is not the law of nations properly so called; for it regards not the mutual intercourse of nations, but the welfare of each particular state (*t*).

(*q*) Vatt. ii. 1, 10—ii. 12, 16.

(*r*) Vatt. iii. 189; Prelim. 9, 17, 20.

(*s*) ii. 8, 26. *Hæc ideo annotavimus, ne quis reperta juris gentium voce apud Romani juris scriptores, statim id jus intelligat, quod mutari non possit: sed diligenter distinguat naturalia præcepta ab his, quæ jus certo statu sunt naturalia: et jura multis populis seorsim communia ab his, quæ societatis humanæ vinculum continent.*

(*t*) Grot. ii. 8, l. 1. *Romani jurisconsulti ubi de acquirendo rerum dominio agunt, complures ejus acquirendi recensent modos, quos juris gentium vocant; sed si quis recte advertat, inveniet eos omnes, excepto belli jure, non pertinere ad jus gentium, de quo agimus; sed aut referendos ad jus naturæ, non quidem merum, sed quod sequitur intro-*

The law of nations is more properly designated international law, which amongst the Romans was termed *jus feciale* (u).

In their divisions of law some of the Roman lawyers recognised three branches: the law of nature; the law of nations; and municipal law; others only two, the law of nations, which natural reason establishes amongst all mankind, and municipal law, which each nation establishes for itself. This division taken in connection with the definition of the law of nations, has led many persons to conclude, that the law of nations is the law of nature, and nothing else (v). Hence arose the opinion prevalent amongst English lawyers, that those who owe no natural or local allegiance to the state in whose territory they are resident, are yet subject to its jurisdiction in respect of offences, that are *mala in se* (w). This error has been confirmed, as noticed by Zouch, by the definition of the law of nations in the civil law. That which natural reason establishes amongst all mankind, is obeyed equally by all nations, and is called the law of nations, as being the law which all nations observe (x). This definition,

*ductum jam dominium, et legem omnem civilem antecedit; aut ad ipsam legem civilem non solius populi Romani, sed multarum circa nationum. Hoc autem non est jus illud gentium proprie dictum; neque enim pertinet ad mutuam gentium inter se societatem: sed ad cujusque populi tranquillitatem.* The same error is noticed by Zouch.

(u) Zouch de leg. del. Jud. p. 6. *Jus gentium magis proprie jus inter gentes appellari potest: quod apud Romanos speciali nomine jus feciale vocabatur.*

(v) Zouch de leg. del. p. 4, 5. *Jurisconsulti Romani alii tres juris species, naturale scilicet, gentium et civile constituunt; alii duos tantum jus gentium, quod naturalis ratio inter omnes homines, et jus civile, quod quisque sibi populus constituit. Ex qua divisione et juris gentium definitione multi inducti sunt; ut jus gentium nihil aliud, quam jus naturale, esse opinentur.*

(w) Bla. Comm. i. 254; Foster's C. L. 188.

(x) Instit. i. ii. ff. 1, i. ix. *Quod naturalis ratio inter omnes homines constituit, id apud omnes gentes persequè custoditur vocaturque jus gentium quasi quo jure omnes gentes utuntur.*

notwithstanding the warnings of Grotius and Zouch, has been mistaken for a definition of international law (y). Such it would become by the alteration of a single word to make it applicable to international transactions; and as such, with the requisite alteration, it has been adopted by Bynkershoek. But international law was not in the contemplation of Gaius, and he never intended so to apply it. But by those who have adopted the error of Puffendorf, it has been so applied, with the omission of its most material element, the uniformity of usage, which in the view of the Roman lawyer constituted the proof of natural reason. These persons hold, that the law of nature unauthenticated by usage, is part of the law of nations. If their doctrine be correct, the slave trade, being contrary to the law of nature, must be a violation of the law of nations; and this, whether it be or be not prohibited by the municipal laws which bind the trader; for the law of nations cannot be varied by municipal regulations. Even the Roman lawyers held slavery to be contrary to the law of nature. By war came captivity and slavery, which is contrary to the law of nature. For by the law of nature all men are born free (z). Again, manumission is derived from the law of nations. For all men being by the law of nature free by birth, slavery, and consequently manumission was unknown to that law. But when slavery came by the law of nations, the benefit of manumission followed by the same law. And when naturally all mankind were known by the designation of men; by the law of nations they became divided into three classes, freemen, slaves, and thirdly, freedmen, that is, those who have ceased to be slaves (a). Slavery is an institution of the law of

(y) Bla. Comm. i. 43; Kent Comm. i. 7.

(z) Instit. i. ii. 2. *Bella etenim orta sunt, et captivitates secutæ, et servitutes, quæ sunt naturali juri contrariæ. Jure enim naturali omnes homines liberi nascebantur.*

(a) Ff. i. 1, 4. *Manumissiones quoque juris gentium sunt, utpote cum jure naturali omnes homines liberi nascebantur, nec esset nota*

nations, whereby one man is subject to the dominion of another, contrary to nature (*b*). If, therefore, the law of nature be part of the law of nations, the slave trade being contrary to the law of nature must be a violation of the law of nations. This question was brought before the Lords of Appeal in the case of the *Amedie*, when an American slave-ship was captured by an English cruiser, but it was not decided by reference to any such principle, but upon the narrowest of technical grounds. It was holden, that to entitle the appellant to restitution he must prove his property; and that, as the slave trade was prohibited by the laws of his country, he could have no property in that, which was so prohibited (*c*). Any other principle adverted to in the argument is unnecessary to support the judgment, and in subsequent cases has been peremptorily denied. The fact of such prohibition must be proved by the captor; for a modern edict, that does not appear, cannot be presumed (*d*). But even this principle is inapplicable in time of peace. There is then no right to search, and where there is no right to visit and to search, there is no ulterior right of bringing in and

*manumissio, cum servitus esset incognita. Sed postea quam jure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine omnes homines appellarentur; jure gentium tria genera esse cæperunt, liberi et his contrarium servi; et tertium genus liberti, id est qui desierant esse servi.*

(*b*) *Inst. i. iii. 2. Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.*

(*c*) *Amedie*, 1 *Dod.* 84, (*π*); *Fortuna*, 1 *Dod.* 81. The report of the case of the *Amedie* is manifestly incorrect; for it is impossible to believe, that Sir William Grant could have supposed, that the international tribunals of any country would be justified in altering their principles of administering international law, in consequence of any alteration in its municipal laws. The grounds of the judgment, as reported, are illogical and contradictory. But the report shews the ground stated in the text, which is sufficient to support the judgment; and considering the character of Sir William Grant, it is reasonable to suppose, that the rest arose from the misconceptions of the reporter.

(*d*) *Le Louis*, 2 *Dod.* 263.

proceeding to adjudication; and if the fact that the vessel is a vessel trading in slaves, be made known to the seizer by his own unwarrantable acts, he cannot avail himself of discoveries thus unlawfully produced, nor take advantage of the consequences of his own wrong (*e*). The effect to be given by foreign courts in time of peace to the prohibition of the slave trade by the law of any nation, was fully considered in the case of *Le Louis*. That was the case of a French ship trading in slaves, and seized in time of peace. It was contended, on behalf of the seizer, that the ship was liable to condemnation, because the slave trade was prohibited by the law of France. The question was asked, what is to be done, if a French ship laden with slaves for a French port is brought in? The Court, without hesitation, answered, restore the possession that has been unlawfully divested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country. What evil follows? If the laws of France do not prohibit, you admit that condemnation cannot take place in a British Court. But if the law of France be what you contend, what would have followed upon its arrival at Martinique, the port whither it was bound? That all the penalties of the French law would immediately have been thundered upon it. Why is a British judge to obtrude himself in subsidium juris, when every thing requisite will be performed in the French Court in a legal and effectual manner? Why is the British judge, professing as he does to apply the French law, to assume cognizance for the purpose of directing, that the penalties shall go to the British Crown and its subjects, which that law has appropriated to the French Crown and its subjects, thereby combining in one act of this usurped authority, an aggression on French property as well as on French jurisdiction (*f*).

Personal slavery arising out of forcible captivity is coeval

(*e*) *Le Louis*, 2 Dod. 242.

(*f*) *Le Louis*, 2 Dod. 255.

with the earliest periods of the history of mankind. It is found existing, and as far as appears, without animadversion in the earliest and most authentic records of the human race. It is recognised by the codes of the most polished races of antiquity. Under the light of Christianity itself, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protections of law. Solemn treaties have been framed, and national monopolies eagerly sought to facilitate the commerce in this asserted property; and all this with all the sanction of law, public and municipal (*g*). Every nation independently of treaties retains the right to carry on this traffic; and the trade carried on by a subject of a nation not bound by treaties to suppress it, must be respected by all tribunals, foreign as well as domestic. So that if their slaves are taken they are to be restored to them, and if not taken under an innocent mistake, to be restored with costs and damages. All this is upon the ground, that such conduct on the part of any state is no departure from the law of nations; because if it were, no such respect could be allowed to it upon an exemption of its own making; for no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own (*h*). This trade was at one time universally allowed by the different nations of Europe, and carried on by them to a greater or less extent according to their respective necessities. Our own country, it is true, has taken a more correct view of the subject, and has decreed a suppression of the trade, as far as British subjects are concerned; but it claims no right of enforcing its prohibitions against the subjects of those states, who have not adopted the same opinion with respect to the immorality and injustice of the trade (*i*). The Lords of Appeal did not mean to set themselves up as legislators for the whole world, or presume.

(*g*) *Le Louis*, 2 Dod. 250.

(*h*) *Le Louis*, 2 Dod. 210.

(*i*) *The Diana*, 1 Dod. 95.

in any manner to interfere with the commercial regulations of other states; or to lay down general principles that were to overthrow their legislative provisions with respect to the conduct of their own subjects (j). The same question was brought before the King's Bench in an action brought by a Spaniard to recover damages for the seizure of slaves on board a Spanish vessel. The words used by the Legislature, said Lord Tenterden, though large and extensive, can only be taken to be applicable to British subjects. By the 56 Geo. 3, c. 36, it appears that a treaty had been made with Spain for the prohibition of an important branch of the trade; and that with regard to the remainder special provisions had been made, and a special Court constituted for the purpose of settling disputes that might occur. Now that shews most strongly that but for such a treaty, the trade would have been perfectly legal in a Spaniard; and the 10th section of that act, by which a certain sum is provided for all losses sustained in consequence of the seizure of vessels previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject. This clause seems to me to be a legislative recognition of a foreigner's right of suit. If this were a trade contrary to the law of nations, said Mr. Justice Bayley, a foreigner could not maintain this action. But it is not, and as a foreigner cannot be bound by the acts of the British Legislature prohibiting this trade, it would be unjust to deprive him of a remedy for a wrong which he has sustained (k). In one of the circuit courts of America it was decided, that the slave trade being unnecessary, unjust, and inhuman, is a violation of the law of nature, and therefore contrary to the law of nations (l). The Court in its judgment, which is elaborately incorrect, adopts the erroneous principles of Puffendorf, and falls into the error which he avoided, of confounding the obligations of treaties with in-

(j) *The Diana*, 1 Dod. 95. (k) *Madrazo v. Willis*, 3 B. & A. 353.

(l) *La Jeune Eugenie*, 2 Mason, 419.

ternational law. In that case it is said that the law of nations rests on the law of nature, and may be deduced, first, from the general principles of right and justice applied to the concerns of individuals, and thence to the relations and duties of nations; or secondly, in things indifferent or questionable from the customary observations and recognitions of civilized nations; or lastly, from the conventional or positive law, that regulates the intercourse of states; so that the law of nations does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It is also said that it may be unequivocally affirmed, that any doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations, and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice; and that it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity. These sweeping principles are in direct contradiction to the judgment of Lord Stowell, who held that no Court can carry its private apprehensions independent of law, into its public judgments on the quality of actions. It must conform to the judgment of the law upon that subject, and acting as a Court in the administration of the law, it cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality, and upon a question of this nature, that standard must be found in the law of nations, as fixed and evidenced by general, and ancient, and admitted practice; by treaties and by the general tenor of the laws and ordinances, and the formal transactions of civilized states; and looking to these authorities there is a difficulty in maintaining that the traffic is legally criminal(*m*). The doctrine of the



circuit Court was overruled, and these principles of the law of nations were recognised by the supreme Court in the case of the *Antelope* (n). Slavery, says Chief Justice Marshall, in delivering the judgment of the Court, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things that is thus produced by general consent cannot be pronounced unlawful. Throughout Christendom this harsh rule has been exploded, and is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force, and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations, that prisoners are slaves. Can those who have themselves renounced this law be permitted to participate in its effects by purchasing the beings who are its victims? Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts and the general assent of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question is decided in favour of the legality of the trade. Both Europe and Africa embarked in it, and for nearly two centuries it was carried on without opposition and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished either personally or by deprivation of property. In this commerce thus sanctioned by universal assent, every nation has an equal right to engage. How is this right to be lost? Each may renounce it for its own people, but can this renunciation effect others? No principle of public law is

(n) 10 Wheaton, 120.

more generally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightly impose a rule upon another. Each legislates for itself, but its legislation can affect itself alone. A right which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. These authorities seem to be sufficient to shew that the law of nature is no part of the law of nations.

Of all rights which have been discussed by public writers as part of the law of nature, the most chimerical are the supposed rights of necessity (*o*), which are a mere excuse for wrong. The discussion of them is futile, for it is absurd to attempt to regulate the exigencies of necessity, which when real admits of no rule.

3rdly. The custom of nations is the law of nations. For the rules prescribed by their will can only be promulgated by their practice. The law of nations, says Grotius, is that which derives its force from the will of all or many nations. It is proved in the same manner as the unwritten law of a particular state, by general usage and the opinions of persons learned in the law (*p*). The general consent of nations is the foundation of international law. It holds a middle place between the law of nature and municipal law, and is of higher authority than the latter, as it cannot be altered without the same general consent, whereby it was constituted (*q*). To determine the

(*o*) Vatt. ii. 119, *et seq.* 170.

(*p*) Grot. 1, i. xiv. 1, 2. Jus gentium est, quod gentium omnium aut multarum voluntate vim obligandi accepit. Probatur autem pari modo, quo jus non scriptum civile, usu perpetuo et testimonio peritorum, et *vid.* Vatt. Prelim. 25.

(*q*) Wicq. i. 808.

law of nations it is sufficient to know what rules are established by general usage, though it may not be easy to discern the reason thereof (*r*). The law of nations, says Bynkershoek, rests upon precedents, and the concurrence of different nations in the same rules (*s*). Usage is the best if not the only interpreter of the rules of international law (*t*). The law of nations arises from tacit and implied compacts, inferred from reason and usage (*u*). The law of nations is the law of human society, resting upon implied compacts (*v*). If you deny the authority of usage and the prescription arising therefrom, which constitutes the law of nations, produce any other laws on which they are agreed; or if that cannot be done, shew the authority by which laws can be sanctioned without such agreement (*w*). We must carefully distinguish between the usage of nations which now exists and the usage which formerly obtained, for the principal part of the law of nations rests only on usage (*x*). Ancient precedents and ancient treaties extant in Greek and Latin historians have their value; but the law of nations changes with the usage of nations. Reason, it is true, is always the same, but where the result of reasoning is ambiguous, as it often is, the law of nations must be inferred from established usage. Many rules formerly formed part of the law of nations which are no longer allowed. For instance, the law of nations

(*r*) Wicq. i. 245.

(*s*) F. L. iii. *Jus gentium se tuetur exemplis, et comparatione rerum a diversis gentibus sæpe eodem modo judicatarum.*

(*t*) F. L. viii. *Usus optimus, si non unicus, earum rerum interpres.*

(*u*) Q. J. P. ii. x. *Jus gentium oritur e pactis tacitis et præsumptis, quæ ratio et usus inducunt.*

(*v*) F. L. xviii. *Jus societatis humanæ, quæ pactis tacitis inducitur.*

(*w*) Q. J. P. ii. ix. *Si tollas consuetudinem, et inde natam præscriptionem, quæ intergentes jus facit; cedo alias regulas, de quibus intergentes convenit; aut si non conveniat, cedo auctoritatem, qua illas obtineri liceat.*

(*x*) Q. J. P. ii. vii. *Inter mores gentium, quæ nunc sunt et olim fuerent sollicitè distinguendum est; nam moribus censetur præcipua pars juris gentium.*

now requires ratification as essential to the validity of treaties, though the negotiator has not exceeded his instructions (*y*).

In discussing the law of nations we must defer to the usage of nations and not rely upon our own reasoning. Different rules may be equally supported by reason, but that reason ought to prevail which is sanctioned by the usage of nations (*z*). Reason and usage determine these questions: reasons may be produced on either side, but those reasons ought to prevail which usage has sanctioned, for the law of nations is founded upon the usage of nations (*a*). The nature and sources of the law of nations, its rules and distinctions have formed the subject of volumes. He will not be wrong, who follows the old lawyers and holds it to be, that which reason has induced, if not all nations, at least the most civilized, to observe in their intercourse with each other. It rests therefore on the double foundation of reason and usage, and depends upon precedents and the analogies which are to be deduced from the comparison thereof. Herein it is distinguishable from the law of nature, which depends not upon precedent, but upon instinct. All controversies respecting the law of nations terminate in this one result: that, what reason dictates to nations, and which by precedent is grown into usage, is the only law of those who are subject to no other. Men being reasonable beings must

(*y*) De Rebus Bell. Præf. Vetera exempla et vetera gentium pacta, quæ apud historicos Græcos et Latinos extant habent sane suum pretium; sed ut mores gentium mutantur sic et mutatur jus gentium. Ratio quidem semper est eadem, sed ubi illa ambigua est, ut sæpe est, in utranque partem; ex perpetuo fere usu jus gentium cestimandum est. Plurima olim juris gentium fuerent, quæ nunc non sunt, ut est in ratihibitione pectorum, etiam si ex mandato principis inita fuerunt.

(*z*) F. L. Præf. In controversiâ, quæ de jure gentium est; sequamur consuetudinem gentium, nec soli sapiamus ex nostro ingenio. Scio ex sola ratione aliud atque aliud placere posse: sed scio eam rationem vincere, quam usus probavit.

(*a*) F. L. vii. Rationes pro utraque sententiâ expediendi, quæ prævalent nunc questionis est. Illæ autem prævalebunt, quas usus probavit, nam inde est jus gentium.

needs find some rules, which reason commends to them as fit to be observed by mutual consent; which, when they have grown into usage are reciprocally binding. Hence arise the laws of war and peace, of treaties, embassies, and commerce (*b*).

The phrase of Grotius, says Lord Stowell, *placuit gentibus*, is quite correct (*c*). Grotius uses a variety of phrases having an invariable meaning to express the binding principle and the only foundation of international law. He speaks of its rules as belonging to the voluntary law of nations established by the will of all or of many nations, as being introduced by usage and implied compact (*d*), by practice and tacit consent (*e*). The phrase, *placuit gentibus*, expresses precisely the same sense as appears from his remarks on the language of

(*b*) F. L. iii. *Jus gentium quale sit et unde sit, quibus regulis contineatur, et quas distinctiones patiat, integris libris pertractatum est. Non erraverit, qui veteres juris auctores secutus id esse dixerit, quod ratione præeunte inter gentes servatur, si non inter omnes, inter plerasque certe et moratiores. Duo igitur ejus quasi fulcra sunt ratio et usus. Id ipsum mihi descripsisse videtur Seneca epistola 120. Nobis inquit, videtur observatio collegisse et rerum sæpe factarum inter se collatio per analogiam nostro intellectu et honestum et bonum judicante. Et ea ratione a jure naturæ distinxisse videtur, quod non usui ascribit epistola 121. Nam postquam instinctum naturalem, quod in animalibus est, exposuisset; mox addit, ex quo apparet non usu ad hoc perveniri, sed naturali amore salutis suæ. Quicquid autem aut quam varie et quam auxie de jure gentium disputetur, eo semper causa recidit; ut quod ratio dictavit gentibus, quodque illæ rerum sæpe factarum collatione inter se observant, unicum jus sit eorum, qui alio jure non reguntur. Si omnes homines nomines sint, id est, ratione utantur, non fieri potest aliter, quin ratio iis quasdam suadeat et imperet, quæ mutuo quasi consensu servanda sunt; et quæ deinde in usum conversa gentes inter se obligant: et sine quo jure, nec bellum, nec pax, nec fœdera, nec legationes, nec commercia intelliguntur.*

(*c*) The Henrick and Maria, 4 Rob. 54.

(*d*) Proleg. 1. *Moribus et pacto tacito introductum. 1, i. xiv. Jus gentium voluntarium, quod gentium omnium aut multarum voluntate vim obligandi accepit.*

(*e*) iii. 2, ii. *More et tacito consensu.*

Paulus respecting the obligation of conventional signs. Non figurâ literarum, inquit Paulus, sed oratione, quam exprimunt literæ obligamur, quatenus placuit, non minus valere quod scripturâ, quam quod vocibus linguâ figuratis significaretur. Upon this Grotius remarks, that Paulus employs the word "placuit" with philosophical accuracy to signify that the force of words is conventional (*f*). Bynkershoek holds the same language; the usage of all or many nations is the only foundation of international law (*g*). That which is recommended by reason and practice and humanity, and thus has been adopted into the usage of many nations; is deemed to be the law of nations (*h*).

Mere speculative general principles are not sufficient to establish any rule, it must be shewn to be conformable to the usage and practice of nations. A great part of the law of nations stands on no other foundation. It is introduced indeed by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and to say, that mere general principles would bear you out in a further progress. Thus for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the means by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction and allows some and prohibits other modes of destruction, and a belligerent is bound to confine himself to those modes which the common practice of mankind

(*f*) iii. 1, viii. 2, (*n*). Valde philosophice dixit, placuit; ut ostenderet hæc valere *ex consuetudine*.

(*g*) F. L. iii. Ita placuisse omnibus vel plerisque gentibus, ex quo solo censetur jus gentium.

(*h*) F. L. xxii. Quod ratione quod usu et humanitate intitur, et sic apud plerasque gentes receptum est; ut pro jure gentium observemus, placuit.

has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes (i).

There the practice of nations is various, there is no rule operating with the proper force and authority of a general law. Mere unity of principle forms no uniform rule to regulate the general practice. Were the public opinion of European states agreed on any principle, as fit to form a rule of the law of nations, it by no means follows, that any one nation would be under an obligation to observe it. That obligation could arise only from a reciprocity (j) of practice in other nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become only not lawful, but necessary for that one nation to pursue a different conduct. It cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other; the rule of substantial justice must be held to be the true rule of the law of nations between independent states; that is to say, the rule to which civilized nations attending to just principles ought to adhere, and rest secure in the reliance of receiving reciprocal justice in their turn. If this reliance should be disappointed redress must be sought in retaliation, which in the disputes of independent states is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution (k). This will be their ultimate security, and it is a security suffi-

(i) Flad Oyen, 1 Rob. 139.

(j) Grot. iii. 1, viii. 2; Domat Tr. des Loix, xi. 39; Valin Comment. iii. 9, x.; Vattel Prelim. 25—l. 11, 21, 36, 47; Answer to Pruss. Men. 1 Colloc. Jurid. 146; Bynk. F. L. iii; Abstine commodo, si damnum metuis, ipse juris gentium, non sola Ulpiani vox est Bynk. Q. J. P. viii.

(k) Cf. Vatt. ii. 341.

cient to warrant the reliance. For the transactions of states cannot be balanced by minute arithmetic (*l*); something must on all occasions be hazarded on just and liberal presumptions (*m*).

The evidence of the custom of nations is to be collected from laws and ordinances; from treaties, so far as they are declaratory of the law of nations; from the works of text writers, and from the judgments of international tribunals. Of collections of laws the most celebrated, and perhaps the only one, with the exception of the ordinances of Louis the 14th, that contains anything properly belonging to international law, is the *Consolato del Mare*. The origin of this venerable work is lost in the obscurity of its antiquity. All that has been written upon it, seems only to prove the impossibility of ascertaining the date or authors of its original compilation. The Italian edition states with a precision, which is in itself suspicious, the periods and places at which it was successively received and adopted by different nations. But this account will not bear examination, and it has been proved by reference to historical facts, that all its dates are either fabulous or incorrect (*n*). Being a collection of maritime customs there can be no doubt that these customs had been established by maritime usage long before they were collected in the *Consolato*, and its authority is little concerned in determining when and by whom the collection was made. The oldest edition is in the Catalan (*o*) language, printed in Barcelona in 1502, by order of the consuls of that city, from various ancient manuscripts. It seems pro-

(*l*) Cf. Grot. ii. 23, i.—ii. 4, iii.

(*m*) Santa Cruz, 1 Rob. 50.

(*n*) Capmany, Mem. Hist. de Barcel. ii. 2, p. 178, lib. de cons. disc. xix.

(*o*) Capmany, lib. de cons. disc. xxii.; Emerig. Tr. des Ass. Pref. p. 6. It appears that Capmany had seen a still older edition, which made him doubt between the claims of Barcelona and Valentia. The question is of little importance, but the weight of evidence appears to preponderate in favour of Barcelona. Capm. lib. de cons. disc. Append.



bable that the compilation contained in these manuscripts was made towards the middle of the thirteenth century (*p*). Grotius states, that the Consolato is a collection of ancient maritime ordinances established by Greek and German emperors; by the Kings of France, Spain, Syria, Cyprus, Majorca, and Minorca, and by the republics of Venice and Genoa (*q*). By calling it a collection of institutions or ordinances Grotius perhaps intended to intimate, that it had been recognized by the sovereign authority of these states (*r*). For the whole body of the work, though it has prefixed and appended to it the rules of proceeding in the Consular Court of Valencia, and the municipal regulations of Barcelona, consists entirely of the ancient customs of the sea, gathered from the experience of ancient mariners. This appears throughout the whole work and more especially from its opening sentence, which is in these words "These are the good rules and the good customs concerning the business of the sea, which the sage men, who voyage about the world took upon themselves to deliver to our ancestors in the books of the knowledge of good customs." In language the Consolato is barbarous and antiquated, in substance rude and inartificial, applying rules of plain sense and natural equity to maritime controversies. It is to be considered as a collection of the customs of the sea, generally received and allowed by European states (*s*). It is hardly necessary to notice the rash assertion of Mr. Hubner, that the contents of the Consolato are mere private ordinances binding on none, but the subject of those sovereigns, by whom they were promulgated. This writer, says Emerigon, having found in the 274th chapter principles irreconcilable with his system, con-

(*p*) Capmany, lib. de cons. discurs. § ii.

(*q*) Grot. iii. 1, v. (a) 6.

(*r*) Giannone apud Cap. disc. p. xxxii.

(*s*) Capman disc. xxii. xxv. *et seq.*; Emer. Trait. d. Ass. Præf. 6, and the authorities there collected.

ceived a prejudice against the whole work. But if he had examined it with care, he would have perceived that the decisions therein contained are founded on the law of nations. For this reason they have been generally allowed and approved of by all countries, and have furnished ample materials to the compilers of the ordinance of 1681. In spite of the Gothic dress that sometimes disfigures them, it is impossible not to admire the spirit of justice and equity in which they are conceived (*t*)

Of text writers, Grotius (who is styled by Gravina *fax juris gentium*, and by Bynkershoek *ὁ μὲν γὰρ* and *princeps juris publici magister*) is incomparably the first in learning, judgment, and civil genius. His book is characterized by Heineccius in language which becomes one man of genius in speaking of another: *opus quo nullum unquam sol vidit illustrius; et quod vivet, quamdiu studiis præclaris honos inter mortales erit* (*u*). When Grotius began his work, the law of nations was in its rudiments, and he had little beyond his own resources to assist him in completing it. The rules which he has laid down derive their authority from adoption into the usage of nations; such is his authority that he has been generally followed by subsequent writers (*v*). Being aware that this usage is the only foundation of international law, he strove to strengthen his authority by an appeal to the concurrent opinions of writers of all countries, ages, and professions; historians, poets, philosophers, and divines, considering such concurrence to arise either from uniformity of natural reason, which he deemed the foundation of the law of nature, or from uniformity of usage, which is the foundation of international law (*w*).

(*t*) Tr. des. Ass. Præf. 7; Capm. disc. xxx.

(*u*) Heinecc. Prælec. in Grot.

(*v*) Bynk. F. L. viii.; *Tanta est Grotii auctoritas ut hunc præeuntem faciliè alii sequuntur.*

(*w*) Grot. proleg. i. 17, 26, 40, 46, l. i. 1, xiv. §§ 1 & 2.

But he principally relied on the civil law, on which great part of the law of nations is founded (x). The civil law, says Sir Robert Wiseman, an eminent practitioner in the Court of Admiralty, is an auxiliary supplement, or a knowledge assisting in the administration of right and justice between nation and nation, where a local law is of no authority at all. Grotius, the ornament of his age for learning and wisdom, undertaking in his most singular book, *De jure belli et pacis*, to set down the several heads of that law which serves to direct those great transactions of peace and war between nation and nation, and to reconcile their differences, professes to have borrowed towards the perfecting of that admirable work much from the books of the civil law; because, saith he, they often make very clear discoveries of the law of nature, and do give frequent instances both of that law and of the law of nations also. So that although whatever we read in the text of the civil law was not intended by the Roman Legislators to reach or direct beyond the bounds of the Roman empire; neither could they prescribe any law to other nations which were in no subjection to them; yet, since there is such a strong stream of natural reason continually flowing in the channel of the Roman laws, what should hinder but that the same general rule of justice and dictates of reason may be also fitly accommodated to foreigners dealing with one another (as it is plain they have been by the civilians of all ages) as to those of one and the same nation: when one common reason is a guide and a light to both? All those writers that handle and treat of those controversial things, which frequently come to be disputed between one nation and another, as they are all civilians; so though they do make use of other authorities besides, yet the strongest and most convincing arguments that they bring to resolve them by,

(x) Per Sir W. Scott, arg. *Maria*, 1 Rob. 363; Kent Comm. i. pp. 11, 12.

are fetched from the general rules of equity and right reason set down in the civil law. And moreover by, as it were, a general consent of nations, there is an appealing to and a resting in the voice of the civil law in these cases between nation and nation. If we will deal in foreign affairs, and converse with foreign people, we must be contented to stand and submit ourselves to such a law, how foreign soever, as is proper for those very matters, and to which other nations do refer themselves; which is the civil law, that nature hath breathed out itself in, and nations have consented unto (*y*). Although the questions we are considering, says Bynkershoek, depend, not upon the Roman law, but upon the law of nations, it may not be improper to state the principles of the Roman law, for in listening to that law, we appear to be listening to the voice of all nations (*z*). But the authority of the Roman law prevails only so far as it has been adopted into the usage of nations. If the Roman lawyers had laid down their rules as part of the law of nations, international law would not be fixed thereby. If other nations following a different mode of reasoning, have adopted a different rule, which has prevailed in the general usage of nations, the law of nations is settled by that rule (*a*).

Admirable as the work of Grotius is, it must be confessed that it is deficient in method. He neither observes the divisions, of which his subject is capable, nor abstains from digressions that have little or no connexion with it. His first

(*y*) Wiseman Excell. of Civil L. pp. 311, 103—4, 9—306.

(*z*) Bynk. F. L. vi. *Quamvis non de populi Romani, sed de gentium jurisprudentiâ agamus: non tamen absque erit de jure Romani quâdam præmonuisse cum qui id audit vocem fere omnium gentium videatur audire.*

(*a*) F. L. vi. p. 155. *Quin et si quod Romani dixerunt, plane et rotundo ore dixissent de legatis externarum gentium, non inde continuo efficeretur jus gentium. Sic illi saperent rationem suam secuti, si aliter saperent aliæ gentes aliam rationem secutæ, earumque sensus prevaleret; id esset jus gentium, de quo de foro legatorum finienda esset quæstio.*

book contains disquisitions on the lawfulness of war with reference to the precepts of religion, the nature of government, the right of resistance, the rules of conscience as to the defence of property and life, and the exigencies of necessity; the rights and duties that arise from domestic relations; the nature and principles of corporations; the rules of legal succession, of equitable restitution, of contracts, promises, and oaths, and of the reparation of injuries. Many of these disquisitions are curious and valuable in themselves, and in the course of them he has anticipated many modern doctrines as to freedom of trade (*b*), impunity of opinions (*c*), liberty of conscience (*d*), and the purposes and proportions of punishment (*e*). It must be observed, however, that his work is divided into two parts. In the first, which is continued to the eighteenth chapter of the second book, he treats of the law of nature, and only mentions incidentally the law of nations. The remainder of the work is appropriated to international law, and is less interrupted by these digressions. Grotius has not escaped the confusion which inaccurate language always entails. This has arisen principally from his use of the phrase *jus naturæ*. In legal phraseology it would be difficult to find two words so vague in separate signification, and in combination so indefinite in these. The consequence is, that his division of law has two logical defects. It comprises more than its subject, and its branches are not distinct. He first divides law into natural and voluntary. Voluntary law he divides into divine and human; human law into municipal and international (*f*). Of the law of nature (which, he says, may in one sense be termed divine, as it proceeds from principles implanted in us by the divine will) he gives the following account. The wellbeing of society is the

(*b*) ii. 2, xiii. v.

(*d*) ii. 20, xliii. l.

(*c*) ii. 20, xviii.

(*e*) ii. 20, 1 to 37.

(*f*) Proleg. 6, *et seq.* l. i. 1, x. xiv. xv.

source of law, or right properly so called, which consists in giving to every man his own, in restoring it, if it has been taken from him; in the performance of engagements; the reparation of injuries; and the infliction of punishment where punishment is due (*g*). From this strict sense of the term, another and less proper sense has been derived, whereby men are required to exercise a sound discretion in estimating the character of their actions, and not to be led by fear, or pleasure, or impulse to such as are pernicious in their effects (*h*). This sense of the phrase also includes the subordination of society by the classification of its members according to their merits or circumstances (*i*). The law of nature is the dictate of sound reason, imputing to actions moral obligation or moral turpitude, as they are suitable or repugnant to the nature of a rational and social being, and consequently commanded or forbidden by God, the author of nature (*j*). The law of nature, according to this account of it, consists of the rules of natural justice and abstract propriety. These rules acquire the force of law when sanctioned by public authority or the general will of nations. When so sanctioned they do not form a separate branch, but fall under the head of municipal or international law, according to the nature of the sanction they receive. When not so sanctioned, they fall under the head of morals, and form no part of law. Puffendorf's view of the law of nations was far less accurate than that of Grotius. His great work is a treatise on the law of nature: in other words, a disquisition on the whole duty of man. The manner in which it has been coupled with that of Grotius, shews greater familiarity with its title than with its contents. Many matters connected with international law are incidentally discussed in various parts of his work: but of seventy-four chapters, six only are appropriated to that

(*g*) Proleg. 8.(*h*) Proleg. 9.(*i*) Proleg. 10.(*j*) i. i. x. i.

subject, and in those it is superficially treated, in the opinion of Barbeyrac, because he found the subject exhausted by Grotius.

In order to elucidate the difference of the doctrines of Grotius and Puffendorf as to the foundations of international law, it may be proper to give a short account of the view taken by the latter of the law of nature. Law, according to Puffendorf, is a rule of action imposed by the will of a superior, and is either divine or human. As the will of God may be promulgated either by his works or by his word, divine law is either natural or revealed. The law of nature is a rule of action sanctioned by the will of God to be collected from the constitution of human nature, and the consequent tendency of actions to promote or impair human happiness. Whatever tends to promote the wellbeing of society is commanded, whatever tends to obstruct or impair it is prohibited by the law of nature. It is founded on utility; not that fluctuating and partial utility, which suits the occasional and transient interest of particular persons at particular seasons, but on that which is general and permanent, and constitutes the wellbeing of all persons at all times (*k*). It is an immutable and universal law; immutable, because unlike municipal laws it is not liable to arbitrary change; universal, because all mankind in all ages are equally bound by it. The law of nations, according to Puffendorf, is the law of nature applied to international transactions.

Hence it appears that the law of nations, according to Puffendorf, terminates in nothing different from mere moral obligation, or the rules of abstract propriety, and consequently international law in his view of it amounts to nothing more than international morality. The obligation of international custom he peremptorily denies, and asserts that the violation of it is a mere rudeness and incivility (*l*). In short, he con-

(*k*) Puff. ii. 3, xi.

(*l*) Puff. ii. 3, xxiii.

founds those customs which are peculiar and optional, with those which are general and of reciprocal obligation. Hence the difference between Grotius and Puffendorf, as to the nature and foundations of international law plainly appears. Grotius is most careful to distinguish between the law of nature and the law of nations. The latter he founds exclusively on the general usage of nations, which he holds to be the only evidence of it. Puffendorf entirely denies the authority of general usage, and his doctrine, putting aside the mass of words with which he has incumbered it, amounts to this: that the rules of abstract propriety resting merely on unauthorized speculations, and applied to international transactions, constitute international law, and acquire no additional authority, when by the usage of nations they have been generally received and approved of. So that the law of nations, according to Puffendorf ends, where according to Grotius it begins.

It is impossible not to suspect that Puffendorf sought to place the law of nations on a new basis, only because he found an abler architect in possession of the old foundations. The truth seems to be, that the law of nature may in an improper sense be said to be the foundation of the law of nations: for it is only the substantial justice of a rule that can procure its adoption amongst civilized states: and when so adopted, it becomes a part of international law.

Little can be said in favour of their commentator Barbeyrac, except that he sometimes furnishes useful references. So little was he capable of appreciating the merits of Grotius, that allowing an extravagant authority to the law of nature as laid down by Puffendorf, he altogether repudiates the sanction of international usage (*m*), whereon Grotius had judiciously and correctly founded his whole system. This

(*m*) Barb. notes to Puff. ii. 3, xxiii. (*n*) 2; Pref. to Puff. cxi.; Grot. i. i. xiv. (*n*) 20—ii. 18, *n*. (*aa*).



confusion of the law of nature with the law of nations, which Puffendorf adopted from Hobbes (*n*), and into which Hobbes was probably misled by not observing the distinction between the ancient and modern signification of *jus gentium*, has led subsequent writers to assert, that the law of nations contains in it nothing of the nature of law. This objection, when closely examined, seems to have no substance in it. Law in the ordinary signification of the term is binding for no other reason, but that it expresses the will of the state. The will of the state may be expressed by its constituted organ, or by a long course of usage in conformity therewith; and independent states having no constituted organ for the expression of their common will can only express it by established usage (*o*). Ancient custom is reasonably observed as law, and is that law, which is said to be established by usage. For since written law is binding only because it is sanctioned by the will of the nation, it is reasonable that those unwritten rules, which the nation has sanctioned, should be binding upon all. For what matters it, whether the nation declare its will by its suffrages, or by a long course of usage in conformity therewith (*p*).

We are deceived, if we imagine the law of nations to be other than it is described to be by the old lawyers, who make it to depend wholly upon reason and usage. As the custom of a people forms part of their municipal law, and is binding upon all, so the custom of nations is binding upon each, unless it be distinctly disclaimed, as it may be, before

(*n*) Puff. ii. 3, xxiii.

(*o*) Grot. i. 1, xiv. 1 & 2—ii. 18, iv. 2 & 5.

(*p*) Ff. i. 3, xxxii. *Inveterata consuetudo non inmerito pro lege custoditur; et hoc est jus, quod dicitur, moribus constitutum. Nam cum ipsæ leges nullâ aliâ ex causâ nos teneant; quan quod judicio populi receptæ sint: merito et ea, quæ sine ullo scripto populus probavit tenebunt omnes. Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis.*

it has been adopted in practice (*g*). A practice or institution, that is conformable to the law, as evidenced by ancient and general usage, is no longer *res integra*, for no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own (*r*). No law of any state can affect any right or interest of foreigners, unless it be founded upon principles, and impose regulations that are consistent with the law of nations (*s*). If any one nation should think proper to depart from the common usage of the world, and to set up a novel institution; other nations are under no necessity of acknowledging it, though it be countenanced by general theory independent of all practice. Nor on the other hand are they therefore let loose from the law of nations, and at liberty to assume, as much as they think proper; the true mode of correcting the irregular practice is by protesting against it, and by inducing that country to reform it (*t*).

The whole human race, says Domat (who does not however sufficiently distinguish between the law of nature, the obligation of treaties, and the law of nations) forms an universal society divided into different nations and governments having intercourse with each other; and laws are necessary to regulate the order of that intercourse both for sovereigns and their subjects, which includes the usage of embassies, of negotiations, of treaties of peace, and all other matters upon which subjects or sovereigns of independent states have intercourse and relations with each other. All these matters could only be regulated by law; and as one nation has no power to impose

(*g*) Bynk. F. L. xxiv. Fallimur si aliud isse jus gentium putemus, quam putaverunt veteres jurisconsulti: quodque ratione et usu totum absolvitur. Ut juris civilis pars est populi consuetudo, quæ singulos obligat; sic gentium consuetudo ex præsumptâ voluntate singulas gentes obligat: nisi palam obnunciaverint: ut re integrâ obnunciare possunt.

(*r*) *Le Louis*, 2 Dod. 251. *The Antelope*, 10 Wheaton, 120.

(*s*) *Le Louis*, 2 Dod. 239.

(*t*) *Flad Oyen*, 1 Rob. 140.

laws upon another, there are two kinds of laws which furnish rules for this purpose. One consists of the natural laws of humanity, hospitality, and fidelity, and the rules resulting therefrom, which determine how different nations ought to behave to each other in peace and in war. The other consists of rules agreed on by treaties, or by usages which are reciprocally binding. The violation of these laws, treaties, and usages, are repressed by open war, by reprisals, and by other measures of retaliation proportioned to the magnitude of the wrong and the design with which it was committed (*u*). When everything else, says Sir Robert Wiseman, has a law to guide it, insomuch as no one society, or petty commonwealth, can stand without some law; the like necessity must there needs be of some law to maintain and order the communion of nations corresponding and acting together. The law, which guideth the transactions, which are usually observed to arise between grand societies is the law of nations. The strength and virtue of which law is such, that a people can with as little safety violate it by any act, how advantageous soever it may seem to be to the whole body, as a private man can in hope to benefit himself infringe the law of his country. Nay, of such power and pre-eminence is the law of nations, that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man by his private resolutions, the law of the whole commonwealth or state wherein he liveth; for as a civil law being the act of the whole body politic, doth thereby overrule each several part of the same body; so there is no reason that any one commonwealth of itself should, to the prejudice of another annihilate that, whereupon the whole world hath agreed (*v*).

The inadequacy of its sanctions is an imperfection which attaches to international law in common with all other law; for there is no law so practically perfect as to allow no crime

(*u*) *Traité des Loix*, xi. 39.

(*v*) *Excell. of Civ. Law*, p. 99, *et seq.*; *Vatt.* i. 283—ii. 53, 70.

to go without punishment, and no wrong without redress. Opinion and force are the only sanctions of law, and international and municipal law, so far as the former is capable of being administered by judicial tribunals, are in this respect not distinguishable. Nor, where this capacity ceases are they specifically distinguishable by the mischiefs that attend the means that are necessary to enforce them. The evil of which international law justifies the infliction upon an offending state, reaches its unoffending members; but the punishment, which municipal law inflicts upon a criminal, affects his innocent relations. The one is as much law in the strictest sense of the term as the other; but it is not capable of being enforced with as much certainty and as little mischief. The difference is a difference of gradation and not of kind.

Grotius and Puffendorf were followed by Bynkershoek, who applied to select questions of international law the vigorous logic of a masculine understanding, and defined and corrected much that his predecessors had left vague and inaccurate. The work of Vattel, who copies the errors of Barbeyrac (*w*), has little merit beyond that of a convenient abridgment. His work is entitled *The Rights of Nations*, and his first book is principally occupied in discussing abstract principles of constitutional law. He is more frequently cited than any other writer, because he is more accessible; and because his doctrines are so loosely expressed, that it is easy to find in his book detached passages in favour of either side of any question. He is said to have fallen into great mistakes in important practical discussions of public law (*x*). Yet many of his disquisitions have great merit, and Sir William Scott, with equivocal praise, has declared him the most correct of modern writers on the law of nations (*y*).

(*w*) Vatt. Pref. xv.—xxv.; Prelim. 26—iii. 192.

(*x*) Sir J. Mackintosh's Int. Lect. cited by Story, J., *arguendo* Buron v. United States, 8 Cranch, 140.

(*y*) *The Maria*, 1 Rob. 363.

In the division of his subject he correctly distinguishes the law of nature and the obligation of treaties from international law. But the remainder of the division is difficult to be understood. It consists of two branches, voluntary law and customary law, without expressing any specific difference, by which they are to be discriminated. At first sight it appears that he means to distinguish between the law of nations and the general custom of nations. But his use of the phrase "*jus voluntarium*" throughout his work shews that he adopted it in the sense of Grotius to mean international law, as distinguished from international charity, and to express those rules of international conduct which are prescribed by the general will of nations, and he could hardly fail to see that the general will of nations cannot be expressed otherwise than by the general practice of nations. It is possible, therefore, that by customary law he means the peculiar customs of particular states in their intercourse with foreign nations; and in this sense he is perfectly correct in saying, that customary law may be varied or abandoned at pleasure, but that such variation or abandonment should be previously notified (*z*). But the phrase itself in this sense is manifestly incorrect, inasmuch as that which has no binding obligation, can in no sense be properly called law (*a*). No reciprocal obligations are imposed by customs which are peculiar and not established by the general practice of nations (*b*).

But the knowledge of this subject to be obtained from elementary writers is necessarily superficial. Elementary

(*z*) Grot. ii. 3, 5.

(*a*) Grot. iii. 1, viii. 2. *Adhibenda distinctio est, qualem adhibuimus ad tollendam ambiguitatem in voce juris gentium. Diximus enim jus gentium dici et quod singulis gentibus placuit sine mutuâ obligatione: et id quod mutuam obligationem in se continet.*

(*b*) Grot. iii. 1, viii. 5. *Consuetudo singulorum arbitrio, non quasi communi sensu introducta, neminem obligat.*

writers, says Mr. Justice Story, rarely explain the principles of public law with the minute distinctions which legal precision requires. Many of the most important doctrines of the Prize Courts will not be found to be treated of, or ever glanced at, in the elaborate treatises of Grotius, or Puffendorf, or Vattel. A striking instance is their total silence as to the illegality and penal consequences of a trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulates the decrees of prize tribunals, and the complexity of modern commerce has added incalculably to the number, as well as the intricacy of questions of national law. In what publicist are to be found the doctrines as to the illegality of carrying enemy's dispatches, or of engaging in the coasting, fishing, or other privileged trade of the enemy? Where are transfers in transitu pronounced to be illegal? Where are accurately or systematically stated all the circumstances which impress upon a neutral, a general, or limited hostile character, either by reason of his domicile, his territorial possessions, or his connexion with a house of trade in the enemy's country (*c*). Although the text writers do not contain the doctrines referred to by Mr. Justice Story, they contain the principles upon which they are founded. Legal reasoning fills half the pages of international law (*d*); and these doctrines are derived from legal reason applying rules established by general usage to cases which are new in their circumstances. Grotius, in discussing the rights of ambassadors, lays down the rule, that when the extent of international usage is rendered doubtful by conflicting precedents, it must be ascertained by the judgment of the learned, and by legal analogy; *recurrendum tum ad sapientum judicia, tum ad conjecturas* (*e*). It

(*c*) The *Nereide*, 9 Cranch, 388.

(*d*) Alber. *Gent. de jur. bel.* ii. xviii.; Bynk. *Q. J. P. Præf. F. L.* iii.

(*e*) Grot. ii. 18, iv. 2.

would be impossible otherwise to determine between conflicting precedents which of them conform to international usage, and which violate it. If this principle were not admitted every breach of international law would annul its authority, whereas the legal consequence of such breach is to deprive the party committing it of the benefit of the rule which he violates. All cases that are within the same reason are within the same law. All law is resolvable into general principles; the cases which may arise under new combinations of circumstances leading to an extended application of principles ancient and recognised, by just corollaries may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is justly chargeable with being an innovation on the ancient law (*f*). Elementary writers on the law of nations can only lay down the general principles of law, and it becomes the duty of Courts to lay down rules for the proper application of these principles. Bynkershoek appears to express doubts whether reasoning from analogy be allowable in international law. But an examination of the passages shews that he only condemns the abuse of analogy for the purpose of inventing principles, or of extending them beyond the limits within which usage has restrained them. He does not mean to exclude analogy, when applied not to principles but to rules; for that would be to exclude the only test by which it is possible to ascertain their soundness, or the correctness of their application. In cases, says Sir William Scott, where the Court has little authority to resort to, it has to collect the law of nations from such sources as reason supported in some slight degree by the practice of nations may appear to point out (*g*). In exploring an unbeaten path, says Chief Justice Marshall, with few if any aids from precedents or written law, the Court has found it necessary to rely much

(*f*) *The Atalanta*, 6 Rob. 458.

(*g*) *The Adonis*, 5 Rob. 259.

on general principles and a train of reasoning founded on cases in some degree analogous (*g*).

The deficiencies of elementary writers are supplied by the decisions of international tribunals. The most valuable collections of these decisions are contained in Valin's Treatise on the French Prize Code, and in the reports of cases decided in the English Court of Admiralty, and in the Supreme Court of the United States. The judgments of Lord Stowell, in the Admiralty Court of England, have been held up as models of judicial eloquence (*h*); and making some allowance for figurativeness of expression, and redundancy of language, this praise does not seem exaggerated. In Chief Justice Marshall and Mr. Justice Story, the Supreme Court of the United States have furnished judges not unworthy to be his rivals. There is scarcely a decision in the English Prize Courts on any general question of public right, that has not received the express approbation and sanction of the American Courts (*i*). To ascertain the unwritten law of nations, says Chief Justice Marshall, we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree fixed by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of every country shew how the law of nations in the given case is understood in that country, and will be considered in adopting the rule, which is to prevail in this. Without taking a comparative view of the justice or fairness of the rules established in the British Courts, and of those established in the Courts of other nations; these are circumstances not to

(*g*) Schooner Exchange, 7 Cranch, 136, vid. Bynk. F. L. iii. p. 151.

(*h*) La Jeune Eugenie, 2 Mason, 456.

(*i*) Kent Comm. i. 66.



be excluded from our consideration, which give to these rules a claim to our attention, which we cannot entirely disregard. The United States have at one time formed a component part of the British Empire; their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. It will not be advanced, in consequence of this former relation between the countries, that any obvious misconstruction of public law, made by the British Courts, will be considered as furnishing a rule for the American Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations (j).

International law naturally divides itself into two branches; first, international rights in time of peace; secondly, international rights in time of war. These two divisions will furnish the subjects of the following chapters. Grotius has inverted this order, and has treated first of the rights of war, and there is great temptation to follow his example. For the rights of war only have been made the subject of judicial decisions, and are capable of being treated with legal accuracy. But as the rights of war arise from a violation of the rights of peace, it seems that the former cannot be treated with propriety, till the latter have been ascertained.

(j) *Bentzon v. Boyle*, 9 Cranch, 198, et vid. the dictum of Story, J., 5 Cranch, 135.

## CHAPTER II.

## OF INDEPENDENT STATES AND THEIR TERRITORIES.

THE subject of international law has been defined to be the rights of independent states and their sovereigns. In this definition the word sovereign must be understood to comprise every form of sovereignty by which the will of a state is represented in its intercourse with foreign powers, whether it reside in one or more and be designated by the style of king, emperor, senate, or any other title (*a*). Subjectum commune civitatis est civitas: subjectum proprium est persona una pluresve, per cujusque gentis legibus ac moribus (*b*). Est populi liberi et regis, qui vere rex sit eadem ratio (*c*). Qui jus verum imperandi habet, sive is rex sit, sive senatus sive populus (*d*), idem jus eadem que ratio est procerum (*e*).

The rights of sovereignty are divided into those, which are internal and permanent, and those which are external and occasional (*f*).

Occasional rights of sovereignty consist of the employment of public ministers, and consuls: of the right of concluding treaties, of the right of reprisals, and the right of making war (*g*). The internal and permanent rights of sovereignty

(*a*) Vatt. i. 40.

(*b*) Grot. i. 7, iii.

(*c*) Grot. i. 3, xxi.

(*d*) Grot. i. 4, xviii.—xix. i. 3, viii. 6; Vatt. i. 57—ii. 38.

(*e*) Grot. i. 3, viii. 6.

(*f*) Heinecc. El. ii. 136, 137.

(*g*) Heinecc. El. ii. 137; Wicq. i. ss. ii. and iv. p. 86.

are those which an independent state exercises within its own territories. Every nation possessing territories, and subject only to its own laws, is an independent state (*h*). Civitates, quæ sedem certam et ibi imperium habent (*i*). All independent states are equal in contemplation of law, and enjoy equal rights without regard to the extent of their territories, the form of their government, or the amount of their resources (*j*). Every state has the right to determine its own form of government (*k*), and to exercise all legislative, judicial, fiscal, and commercial; and in a word, all sovereign powers, civil, military, and ecclesiastical within its own territory (*l*). The territory of a state includes all rivers and parts of rivers, bays, ports, and harbours that are within it (*m*), and so much of the sea as is commanded by the coast (*n*). For the sea within gun-shot is no less under the control and in the possession of the state, than the adjoining land. The rule of law on this subject is, *terræ dominium finitur, ubi finitur armorum vis*: and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. A question was raised as to the mouth of the Mississippi, what was to be deemed shore, as there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as part of the territory of America, not being of consistency

(*h*) Grot. i. 1, xiv.—i. 3, vii.—ii. 9, iii.—iii. 3; Vatt. i. 4.

(*i*) Bynk. Q. J. P. i. xvii.

(*j*) Vatt. Prel. 18, *et seq.*—ii. 7, 36, 38, 39, 47, 174; Huber de civ. i. 14, xiii.—i. 15, i.

(*k*) Grot. i. 3, viii. 2; Puff. vii. 4; Heinecc. El. ii. 115, *et seq.*; Vatt. i. 31, 34, 36, 37.

(*l*) Grot. i. 3, vi. 2; Puff. vii. 4; Vatt. i. 25, 27, 138, 146, 204, 205—244, 245—ii. 54, 58, 59; Heinecc. El. ii. 131, 136, 168, 182, *et seq.*

(*m*) Grot. ii. 3, vii.—ii. 2, xii; Puff. iv. 5, viii., Vatt. i. 266, 290, 291.

(*n*) Grot. ii. 3, xiii.; Bynk. D. M. 2, Q. J. P. i. viii.; Kent Comm. i. 29; Vatt. i. 289, 290; The Anna, 5 Rob. 385, (*c*).

enough to support life, and being uninhabited, and only resorted to for shooting and taking birds' nests. It was held that the right of dominion does not depend upon the texture of the soil, and that these islands were to be deemed appendant to the main land, and comprised with the bounds of the adjoining territories (*o*).

Provinces (*p*) and colonies however distant form part of the territory of the parent state (*q*). So of its ships on the high seas (*r*). The rights of sovereignty extend to all persons and things, not privileged, that are within the territory. They extend to all strangers resident therein; not only to those who are naturalized, and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory (*s*). All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection (*t*). Whether a natural subject can transfer his allegiance; in other words, whether a man can put off his native country and adopt another, is a question which depends upon the law of his native state (*u*). The allegiance of a native British subject is indelible (*v*). No allegiance is due from alien enemies detained as prisoners of war (*w*), nor from those, whom a sovereign detains by illegal violence, as in the case of Mary Queen of Scots; for he cannot found jurisdiction on his own wrong. But alien enemies may

(*o*) The Anna, 5 Rob. 385, (*c*).

(*p*) Grot. i. 3, vii. 2; Heinecc. El. 1, 231.

(*q*) Vatt. i. 210; Puff. viii. 12, v.

(*r*) Vatt. i. 216.

(*s*) Grot. ii. 18, iv. 5; Bynk. D. M. 2 sub fine, F. L. ii. & iii. & xxiv. p. 183.

(*t*) Grot. ii. 2, v.—ii. 11, v.—ii. 18. iv. 5; Vatt. i. 230.—ii. 101, *et seq.*; Bynk. F. L. ii.; Ibid. iii. p. 150—xxiv. p. 183.

(*u*) Grot. ii. 5. xxiv.; Bynk. F. L. iii. p. 150; Q. J. P. xxv. 6; Vatt. iv. 112; Puff. viii. xi. 3.

(*v*) Fost. C. L. 7, 59, 183; Bla. Comm. i. 369.

(*w*) Fost. C. L. 188.

be entitled to the occasional protection of the Crown. Thus, although alien enemies are incapable of suing in British Courts (*x*), yet where such persons were employed to navigate a British vessel disguised as an enemy to a hostile port and back under the protection of a British license, it was held that they were entitled to sue for wages, and that the owner of the vessel was estopped from averring their hostile character (*y*). So, when alien enemies navigated an enemy's ship to a British port under the like protection (*z*). In such cases the hostile character is suspended for the purposes of the transaction by consent of the sovereign.

No allegiance is due from ambassadors to the sovereign of the country wherein they are sent to reside. The nature and extent of their privileges will be considered in a subsequent chapter.

Nor is allegiance due from an independent sovereign. The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by a mutual interchange of good offices, which humanity dictates, and its wants require; all sovereigns have consented to a relaxation in practice, in cases under peculiar circumstances, of that absolute and complete jurisdiction within their respective territories, which sovereignty confers. This consent may in some instances be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world. This full and absolute territorial jurisdiction,

(*x*) *Anthon v. Fisher*, 1 Doug. 648, (*n*); *Brandon v. Nesbitt*, 6 T. R. 23; *The Charlotte*, 1 Dod. 212.

(*y*) *The Frederick*, 1 Dod. 266.

(*z*) *Maria Theresa*, 1 Dod. 303.

being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license ; or in the confidence, that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, has given rise to a class of cases, in which every sovereign is understood to wave the exercise of a part of that exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

One of these is admitted to be the exemption of the person of a sovereign from arrest or detention within a foreign territory. If he enter that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation. The whole civilized world has concurred in this construction, because a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security however need not be expressed, it is implied from the circumstances of the case. Should one sovereign enter the territories of another without his consent, express or implied, it would present a question which does not

appear to be perfectly settled. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be, because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their generosity has placed in their hands (*a*).

Thus, even Louis 11, was ashamed of having arrested Alphonso, king of Portugal, during his visit to France, and caused vessels to be equipped, wherein he was honourably conveyed to his own kingdom (*b*). Francis 1, though advised by his council to seize and detain Charles 5, in order to compel the performance of his promise to restore the Duchy of Milan, allowed him to pass through his territories unmolested (*c*). Charles Emanuel, Duke of Savoy, while he was fomenting faction in France, came on pretence of a visit to the Court of Henry 4, for the purpose of pursuing his intrigues on the spot. Henry 4, against the advice of his council, acting upon his own opinion, which he considered to be more in accordance with the law of nations, dismissed him with impunity (*d*). The alleged arrest of the Duke of Mecklenburgh in Holland, in the year 1693, is disapproved of by Bynkershoek in point of law, and doubted in point of fact (*e*). Bynkershoek holds, that the privilege of an independent sovereign, in extreme cases, is identical with that of an ambassador. If a prince in a foreign territory commit acts of violence either in person or by the hands of his attendants, it cannot be doubted that he may be repelled by force. But if he conspire against the sovereign of the territory, or commit any common offence, reason and the law of nations will be

(*a*) *Schooner Exchange*, 7 Cranch, 116; Bynk. F. L. iii.; Vatt. iv. 108.

(*b*) *Flass. Dip. Fran.* i. 233.

(*c*) Bynk. F. L. iii.; *Flass. Dip. Fran.* ii. 3.

(*d*) Bynk. F. L. iii.; *Flass.* ii. 203.

(*e*) Bynk. *ibid.*

satisfied if he be ordered to leave the country. The same may be said if he should be in debt, for to allow him to be arrested, although perhaps not contrary to strict law, is contrary to the analogy suggested by the rule of the law of nations respecting ambassadors (*f*).

The private property of foreign sovereigns is not privileged, and is liable to the same jurisdiction and the same burthens as the property of natural subjects (*g*). But there is a manifest distinction between the private property of a sovereign, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may be considered as assuming the character of a private individual, but this he cannot be supposed to do with respect to any portions of that armed force which upholds his crown, and the nation he is entrusted to govern. When private individuals of one nation spread themselves through the territory of another, as business or caprice may direct, mingling indiscriminately with the inhabitants thereof, or when merchant vessels enter for the purposes of trade, it would obviously be inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degrada-

(*f*) Bynk. F. L. iii. Si princeps in alieno imperio manu rem agat, vel per se vel per comites, quin manu repelli possit, non puto dubitandum. Si vero quid machinetur adversus principem hospitem, ejusve imperium, si aliud delictum commune perpetret; satis, puto, fiet rationi et juri gentium, si quod hic jus gentium est, si jubeatur finibus excedere, nec amplius turbare rem publicam nostram. In causâ eris alieni idem dixerim, nam arresto detinere principem ut cæs alienum expungat, quamvis forte stricti juris ratio permetteret, non permittit tamen analogia ejus juris, quod de legatis ubique gentium receptum est. Si neges, ubi de jure gentium agitur, ex analogiâ disputari posse, ego negaverim hanc quæstionem expediri posse, cum exempla deficient, quibus consensus gentium probetur: nec quicquam adeo supersit, quam ut ad legatorum exemplum ipsos reges et principes, et quidem magis, ab arresto dicamus immunes, et in eo a cæteris privatis differre.

(*g*) Bynk. F. L. iv.



tion, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can their foreign sovereign have any motive for wishing any exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for refusing to persons of this description any exemption from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But the situation of a public armed ship is in all respects different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him for national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such a vessel enters a foreign port ought to be construed as containing an exemption from the jurisdiction of a sovereign within whose territory she claims the right of hospitality. Upon those principles by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice nations have not asserted their jurisdiction over the public armed ships of a sovereign entering a port open for their reception. The case cited by Bynkershoek of the Spanish vessels seized in Flushing for a debt due from the King of Spain, is the only instance of an attempt made by an individual to assert a claim against a foreign prince by seizing his ships of war. In that case the states general interposed, and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of the government, or by the decision of the Court, the vessels were released. That this proceeding was at once arrested by the government of a nation, that appears

to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in favour of the exemption claimed for ships of war. National ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power is exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to his ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the Courts of the country in which it is found ought not to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to wave its jurisdiction. The injuries inseparable from the march of an army through an inhabited country, and the dangers attending it, do not ensue from admitting a ship of war without special license into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If for reasons of state the ports of a nation generally, or any particular ports be closed against ships of war generally, or against the ships of a particular power, notice is usually given of such exclusion. If there be no prohibition the ports of a nation are considered open to the public ships of all powers with which it is at peace, and they are supposed to enter such ports and to remain in them, while they are allowed to remain, under the protection of the government of the place (*h*).

(A) *Schooner Exchange*, 7 Cranch, 116.

No state has any right to intermeddle in the internal affairs of another (i). This rule is a necessary consequence of the legal equality and exclusive jurisdiction of independent states. A right of interference cannot be claimed even by an ally, much less can it be claimed by a stranger. When certain Carthaginians in Rome preferred charges against Hannibal, Scipio declared that the Roman senate would not be justified in intermeddling in the affairs of Carthaginians. Herein, as Aristotle has observed, consists the difference between a confederacy and a state; that is the duty of confederates to protect each other against foreign invasion, but not against domestic disorders (j). Protection does not take away national independence, which cannot exist without sovereign authority (k).

Queen Elizabeth observed this rule, when she refused the sovereignty or protectorate of Holland and Zealand during their insurrection against Philip 2 (l). The rule was violated by Frederick 2, Catherine 2, and Maria Theresa, when they invaded and partitioned Poland under the pretext of suppressing anarchy (m). Louis 16 violated this rule by furnishing clandestine aid in arms, money, clothing, and ammunition to the revolted colonies of Great Britain before they had even declared their independence; and by making a treaty with them, and thus acknowledging their independence

(i) Grot. i. 3, viii. 2; Vatt. i. 37—ii. 7, 54, 55, 57, 83, iv. 14, 68: *contra*, ii. 56, 62.

(j) Grot. i. 3, xxi. Scipio cum Romæ a Carthaginiensium quibusdam Hannibal accusaretur, dixit non oportere se patres conscriptos reipublicæ Carthaginiensium interponere. Et hoc est, in quo Aristoteles ait, societatem a civitate differre, quod sociis curæ sit, ne in ipsos injuria committatur, non vero ne sociæ civitatis cives inter se injurias committant.

(k) Grot. i. 3, xxi. 3. Patrocinium publicum non tollit libertatem civilem, quæ sine summo imperio interligi nequit.

(l) Camden Eliz. an. 1575.

(m) Flaa. Dip. Fran. vii. 88.

before it was established in fact. The French ministers argued that the interference of France was lawful, because the revolt of the colonies was provoked by the injustice of Great Britain. The British government replied, that France could not take advantage of such supposed injustice without introducing into international law principles equally novel and dangerous, and asserting the right of any foreign prince to assume jurisdiction over the affairs of an independent state, and to take cognizance of the disputes of its sovereign and his subjects (*n*). Flassan suggests a mode whereby the French government might have accomplished their object without violating the law of nations, if their complaints against the British government had been well founded (*o*). Charles 10 violated the same rule, when he invaded Spain under pretence of restoring order therein (*p*).

International rights and duties are reciprocal. No nation is entitled to exercise any right which it is not bound to allow under the like circumstances; and as no powerful state would allow a feeble neighbour to intermeddle in its domestic affairs, so neither has a powerful state a right to intermeddle in the domestic affairs of a feeble neighbour. The perfect equality and entire independence of all distinct states is a principle of public law generally recognised as fundamental. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized on that ground is mere usurpation. This is the

(*n*) The French ministers also argued, that they were justified in their interference, because Queen Elizabeth aided the Low Countries in their insurrection against Spain. Such an argument is best answered in the language of Grotius, ii. 21, viii. 3. *Agathoclis illud nemo non ridet, qui ad Ithacensium querelas de damnis illatis respondit, plus mali Siculos ab Ulysse olim pertulisse.*

(*o*) Flass. Dip. Fran. vii. 149—165.

(*p*) Kent Comm. i. 22.

great foundation of public law, which it mainly concerns the peace of mankind both in their politic and private capacities to preserve inviolate (*q*).

The exceptions by which it has been attempted to restrict the prohibition of forcible intervention in the internal affairs of independent states are wholly inadmissible. Even such interventions as are humane and disinterested in their purpose are illegal. Though they may be beneficial in act, they are pernicious in example; for charity may be made a cloak for ambition, and a state is no more justified than a private person in doing evil that good may come. Though its charity be genuine, a nation has no right to impose benefits upon its neighbours by force, or to gratify its humanity at the expense of their independence (*r*). To procure an eminent good by means that are unlawful is as little consonant to public justice as to private morality. A nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose, nor in setting out on a moral crusade of converting other nations by acts of unlawful force (*s*). It has been said that the rule is subject to exceptions, which cannot with propriety be expressed in institutes or elements of international law. This evasion, which hath been applied to excuse the usurpation of kings, is just as applicable to excuse the usurpation of republics; but it is not therefore entitled to the indulgence with which it has been cited by a republican lawyer (*t*). The admission that such exceptions cannot with propriety be stated in a legal work, is an admission of their illegality; for if they were founded in law and justice, they ought to be stated therein. It cannot be improper that a legal work should be correct, which it cannot be, where it lays down general rules without setting

(*q*) *Le Louis*, 2 *Dod.* 243; *The Antelope*, 10 *Wheaton*, 120.

(*r*) *Vatt.* ii. § 7.

(*s*) *Le Louis*, 2 *Dod.* 257; *Vatt.* ii. § 7.

(*t*) *Kent Comm.* i. 23.

forth the exceptions by which they are limited. Convenience can be no more deemed an excuse for public wrong, than want for private dishonesty. Matter of policy must always be distinguished from matter of law. The concessions which it is prudent to make to a sovereign vary with his power and influence; but those who treat of the law of nations must be guided by more certain rules, or they will never arrive at any fixed principles (u).

The discretion of a statesman is properly employed in determining whether a state shall exercise the right it has; but to assume a right which it has not is mere usurpation. The maintenance of peace is the usual plea with which usurpations are excused. Such was the plea set up by those sovereigns who many years ago took upon themselves by their mutual compacts to dispose, according to their pleasure, of the dominions of other sovereigns, as if they had been the dominions of the contracting parties. Such wrongs are the offspring of what is called reason of state, which, says Bynkershoek, I define—*Monstrum horrendum informe ingens, cui lumen ademptum*. With those who once give way to this monster, and allow themselves to deal with the property of others as their own, all discussion of the law of nations is idle (v).

(u) Bynk. F. L. xxiv. *Prudentiæ politica causam a jure gentium semper distinguendum esse reor. Prout plus minusve metuimus a principibus plus minusve detur omnino expedit: sed qui de jurisprudentiâ gentium acturus est, aliis et certioribus regulis uti oportet: sin autem semper vagabitur pede incerto.*

(v) Bynk. Q. J. P. i. xxv. *His injuriis prætextitur studium conservandæ pacis: quod et ipsum prætextitur injuriis longe adhuc majoribus, quæ potissimum ab aliquot retro annis invaluerunt; quum nempe principes mutuis pactis de aliorum principum regnis et ditionibus de animi sententiâ statuunt, atque si de re suâ statuerent. Has injurias peperit et adhuc parit ratio, quam dicunt, statûs: quam ipse definio.*

*Monstrum horrendum informe ingens, cui lumen ademptum. Huic monstro si semel cedas, semelque tibi indulgeas aliena non alio loco habere, quam tua: jam frustra est omnis disputatio de jure gentium et publico.*

Yet it has been said, that when a country is divided by civil war, each faction is to be deemed an independent state, and that a foreign power may assist those whose cause it deems to be just; and his conclusion is deduced from the principle, that they are independent of all foreign authority, and that no foreign power has any right to judge their acts (*w*).

This doctrine is contradicted by the precedents which in such cases prohibit not only interference, but even intercession. Peter, King of Arragon, having resolved to punish severely the rebellion of the inhabitants of Valencia, was requested to postpone his intention until he had received the ambassadors of Alphonso, King of Castile, who were instructed to intercede on behalf of the rebels. Peter replied, that he was astonished that the King of Castile should propose to send an embassy on such a mission; that all kings should approve of his resolution to punish rebels instead of opposing it; that they were his subjects, and must be left to his discretion (*x*).

In 1571, Walsingham, ambassador of Queen Elizabeth at the Court of France, represented to Queen Catherine that the French ambassador at the English Court was implicated in the conspiracy of the Duke of Norfolk, and was in the habit of speaking with so much zeal on behalf of Mary Queen of Scots, as to give occasion to the belief, that he was acting on the express instructions of his court, and that France was disposed to interfere in the domestic affairs of England. Queen Catherine replied, that the ambassador's private regard for the Queen of Scots should not be permitted to be prejudicial to the service of the Queen of England; and that if he had done any thing displeasing to her, he had disobeyed the orders of the king his master (*y*). When the ambassadors of the Protestant princes of Germany represented to Charles 9 how

(*w*) Vatt. ii. § 56. (Contra Bynk. Q. J. P. ii. 3, sub fine—Wicq. i. 22, and c. 2, *passim*.)

(*x*) Wicq. ii. 93.

(*y*) Wicq. ii. 92.

much it was his interest to respect the feelings and conciliate the affections of his Protestant subjects, he replied that having the title of most Christian King, and being by birth a Catholic, he was bound to maintain the religion in which he had been brought up; that nothing could prevent his employing the ordinary process of law against heretics, who made their religion a pretext for rebellion; and that he required no tutors to instruct him how to govern his own kingdom (*z*).

Henry 3 replied to the ambassadors, who made similar representations to him in the name of the same princes, and taxed him with breach of faith to his Protestant subjects; that he was a sovereign prince having authority to make, to construe, and to repeal the laws at his discretion, and ordered them to leave the kingdom (*a*).

Louis 13 shortly after the marriage of Henrietta Maria, consented that the ambassadors of Charles 1 should interpose, not their mediation, but their good offices, to procure favourable terms of accommodation for the French Protestants (*b*).

When the ambassador of Louis 13 solicited the repeal of a law recently passed against the Roman Catholics, Charles 1 expressed his extreme surprise that the King of France should pretend to intermeddle in the affairs of England to the extent of requiring information respecting the laws that had been enacted in relation to English Catholics. When the ambassador insisted that the King of France was interested in the domestic affairs of his neighbours and allies, inasmuch as the miscarriage of one might be the ruin of many; the king replied, that when the Earl of Carlisle, his ambassador, spoke in favour of the Huguenots during the siege of Montauban, it was intimated to him that his interference in the differences that had arisen between the King of France and his subjects would not be approved of (*c*). Cardinal Richelieu having

(*z*) Wicq. ii. 75.

(*a*) Wicq. ii. 76; Flass. ii. 108.

(*b*) Flass. ii. 403.

(*c*) Flass. ii. 406.



learned that the papal nuncio had been requested by the Count of Soissons to procure for him the intercession of the Pope, informed the nuncio that the king would be displeased if his holiness interfered in the matter; that it was a domestic affair, and that his Majesty would not allow any one to interpose between him and his subjects. On a subsequent occasion the French ambassador was instructed to negotiate for a settlement of the differences existing between the Pope and the Duke of Parma respecting the Duchy of Castro. The instant the subject was mentioned, the Pope declared that he required the personal submission of the Duke; that it would be a pernicious precedent to allow a subject to treat with his sovereign and to negotiate terms of accommodation through the intervention of a foreign power; that he was astonished that the King of France should countenance such a pretension on the part of a subject, since his Majesty had disapproved of the desire of the Court of Rome to intercede for the Dukes of Guise, Montmorency, Lorraine, and others, and had not permitted the Papal nuncio to say one word in favour of the Court of Soissons (*d*). So when the King of France interposed on behalf of the Barberini; Innocent 10 declared, that the case was a domestic matter to be decided in the ordinary course of justice, and that as he had no desire to interfere in the affairs of France, he trusted that his Majesty would not interfere therein (*e*).

When Queen Christina, moved by her admiration of the Prince of Condè, inquired whether the Queen Regent would accept her good offices for the settlement of the differences by which France was divided; the French minister at Stockholm was instructed to reply, that as the affairs of the kingdom were on the point of being settled it was unnecessary that her Majesty should give herself any trouble upon the subject. Her Swedish Majesty felt the rebuke very sensibly, and the

(*d*) Wicq. ii. 78.

(*e*) Wicq. ii. 78, *et seq.*

French resident was informed by one of her ministers that the offer had been made without his advice, and that he did not think that the King of France ought to have accepted it, as a sovereign should not permit any foreign potentate to interfere in his domestic affairs (*f*). Such interference, as Wicquefort justly observes, shews that a foreign prince is desirous of protecting the subjects and taking part in the government of the country, to which his ambassador is accredited (*g*). In 1650, during the quarrel between the Prince of Orange and the States of Holland, when the prince was besieging Amsterdam, the Spanish ambassador offered him the assistance of the Spanish troops for the reduction of the town. The Prince of Orange replied, that the King of Spain had no business to interfere in the domestic affairs of the country; that neither he nor the states required such assistance, and that if the king's troops should advance their differences would cease, and their forces would be united against him. When the differences between the prince and the states were settled, the same ambassador in attempting to repair his first mistake committed another, by demanding an audience of the states to congratulate them on their reconciliation with the prince. As soon as the states were aware of the purpose for which he had demanded an audience, which was not discovered till he was at the foot of the staircase, they sent a message to request that it might be deferred (*h*). So when the French ambassador, in taking leave of the States General, entreated them to shew a little kindness and moderation in their treatment of the Roman Catholic inhabitants of the United Provinces, the states passed a formal resolution, declaring that the proposal of the ambassador was inconsistent with the peace and fundamental laws of the state; that they had heard it with great dissatisfaction, and that to prevent the disorders that might ensue, they

(*f*) Wicq. ii. 79.

(*g*) Wicq. ii. 78.

(*h*) Wicq. ii. 93.

would take measures of such severity as should give those Catholics, who had solicited the interference of a stranger, reason to repent of their insolence. The matter being considered a domestic affair of the highest importance, this resolution was communicated to the ambassador by eight deputies, who added by word of mouth, whatever the resolution seemed to want in strength of expression (*i*). On the same principle an offer of mediation on the part of the States General between the Dukes of Brunswick and Lunebourg and the city of Brunswick, which they were besieging was rejected, and their deputies were not allowed to communicate with the city (*j*).

The doctrine of Vattel, which is as little reconcileable with reason as it is with precedent, is probably founded upon a misconstruction of a passage of Grotius, which does not support it. Grotius states (*k*), that in civil wars necessity sometimes creates an exception to the general rule, that sovereigns only can employ ambassadors; for instance, where a state is so equally divided, as to render it doubtful to which party the sovereignty belongs, in which case one nation is taken for the time to form two nations, and he cites the example of ambassadors sent by Vitellius to Vespasian. But this passage is to be understood of engagements and treaties concluded between the contending parties in civil war, as to matters, which are in the power of each respectively (*l*); such, for example, as the treaty of St. Germain-en-Laye, which was violated by the massacre of St. Bartholomew (*m*). It might have occurred to Vattel, that independence is matter of fact and cannot be imputed to those who are engaged in the struggles of insurrection. As far as it is possible to deduce any principle from his declama-

(*i*) Wicq. ii. 95.

(*j*) Wicq. ii. 95.

(*k*) Grot. 2, xviii. 2, iii.

(*l*) Wicq. i. 22; Bynk. Q. J. P. ii. 3.

(*m*) Flass. ii. 80, 97.

tion about (*n*) Hercules and Busiris and Antæus and Diomed, and the Prince of Orange (*o*); his principle appears to be this, that any foreign state is at liberty to assist the party whose cause is just. But this restriction of interference in favour of the cause of justice is an absolute prohibition of interference on the part of those who have no jurisdiction to determine the justice of the cause. Hence it follows, that no foreign power has any right to interfere in the internal affairs of an independent state. Vattel admits, that it is a violation of law (*p*) to incite disorders in a foreign state, and it is difficult to see how it is not equally a violation of law to foment disorders; or how disorders can be fomented more effectually than by active interference. Nor can this doctrine be reconciled with the principle which he repeatedly inculcates, that no foreign power has a right to interfere in the domestic affairs of an independent state. For the rights of sovereignty are not affected so long as the sovereign power is not displaced. Hence the remark of Tacitus respecting the ambassadors of Vitellius; *nō dato a duce præsidio defensi forent, sacrum etiam in exterarum gentes legatorum jus, ante ipsa patriæ mœnia, civilis rabies usque in exitum temerasset*: for the rights of sovereignty were vested in Vitellius and the senate, and could not be transferred to Vespasian, until he had conquered them (*q*). But the case would have been different if Vespasian had sent ambassadors to Vitellius, for they would have been nothing more than the messengers of rebels (*r*). Hence Lewis of

(*n*) Vatt. ii. § 56. Vattel, who rejected the chimerical theory of Grotius respecting the right of punishment. (Vatt. ii. 7) seems, from this catalogue of classical names, to have adopted its consequences, although he does not avow them. Vide Grot. ii. 20, xl.

(*o*) As to the Prince of Orange, and the legality of the proceedings of the convention, vid. Foster, disc. iv.

(*p*) Vatt. ii. 56.

(*q*) Bynk. Q. J. P. ii. iii.

(*r*) Id. *ibid.*; Wick. i. 38.

Bavaria imprisoned the messengers of the Pisans, who refused to admit him into their town (*s*). So the act of Phillip 2, who put to death the deputies of the Low Countries was cruel, but not illegal (*t*). Where a republic is divided by civil war, neither party can be taken to represent the state, unless the sovereign authority continue unaltered. Hence the states of Holland rescinded all the decrees, which the factions of a subordinate state had passed against each other in time of trouble. Hence also the King of Spain yielded to the remonstrances of one of the factions that divided the city of Genoa, and refused to receive the ambassadors of the other (*u*). So the States General in 1643 refused to receive the ambassador of the Irish Catholics who had rebelled against the Parliament (*v*).

The absence of all jurisdiction to determine the right leads to the necessary consequence, that, when in the result of civil war a state changes its government, or a province or colony, that before had no separate existence, is in possession of the rights of sovereignty; the possession of sovereignty *de facto* is taken to be possession *de jure*: and any foreign power is at liberty to recognise such sovereignty by treating with the possessors of it as an independent state (*w*). Where sovereignty is necessary to the validity of an act, no distinction is or ought to be made between sovereignties founded on a good or bad title. Few governments have been founded on free suffrage, and election; most have originated in violence and faction. In international transactions possession is sufficient. Otherwise it would be necessary to inquire into the origin of sovereignties and to ascertain whether they are founded upon a good or upon a bad title. Such an inquiry could answer no good

(*s*) Bynk. Q. J. P. ii. iii.

(*t*) Wicq. i. 38; Bynk. Q. J. P. ii. iii.

(*u*) Bynk. ii. iii.

(*v*) Wicq. i. 24.

(*w*) Puff. viii. xii. 3; Wicq. i. 40, 57, 58; Bynk. Q. J. P. ii. 3; Vatt. iv. §§ 14, 68; Kent Comm. i. 39.

purpose, and would furnish ample occasion to disturb the peace of nations (*x*).

Every sovereign has the right to permit or forbid the entrance of strangers into his territories and their residence therein, and to prescribe the terms on which such entrance or residence shall be permitted (*y*). Consequently, no sovereign is entitled to demand the expulsion or surrender of any person resident in the territories of another on any pretext whatever. Every state has a right to protect fugitives, and to grant an asylum to exiles. If this were otherwise, the condition of mankind would be lamentable, for the reach of imperial or popular despotism would be boundless. Charles 1 replied to the remonstrance of Lewis 13 respecting the Prince of Soubise, the chief of the Huguenots, who had fled to England; that Henry 4 had received Bothwell, who had attempted the life of James 1 (*z*). But it is needless to multiply precedents, for the right is proved by the authority of text writers (*a*); by the uniform practice of England, Holland, Switzerland, and the United States of America, acquiesced in by those most interested in opposing it; and by the conclusion of treaties for the mutual surrender of criminals, which, but for this right, would be wholly unnecessary and inopera-

(*x*) Bynk. Q. J. P. ii. 3. *Cæterum qui summam potestatem desiderant in iis, qui legatos mittunt non solent distinguere, nec etiam distinguendum est, an eorum imperia ex justo titulo, an ex solâ injuriâ originem traxerit: sufficit enim quod ad eos ad quos legati mittuntur supremâ potestate utantur. Recte Paschalius dixit in Legato, c. 12; Paucissima regna dominatusque memorari possunt, quorum initiis libera gentium suffragia causam dederint. Plura imperia vis enixa est quam electio. Prima fere fundamenta imperiorum sunt turbæ et factiones. In causis publicis utique expedit, uti possidetis ita possideatis: alioquin omnium imperiorum origines essent excutiendæ, justæ nempe sint necne: et sic demum pronuntiandum, qui legatos mittunt, jure an injuriâ mittant. Quod valde esset inutile et gentium tranquillitati turbandæ insignem causam præberet.*

(*y*) Vatt. i. § 230—ii. §§ 94, 100, 114, 135.

(*z*) Flass. ii. 407.

(*a*) Grot. ii. 2, xvi.—ii. 5, xxv.—iii. 20, xli.; Puff. iii. 3, x.

tive. The reception of fugitives is subject to the condition, that they shall not be allowed to use their asylum as a vantage-ground of hostilities against their country. To allow it would be an act of hostility on the part of the state that has received them. Hence, when fugitives are armed bands, it is necessary to disarm and remove them to a distance from the frontier.

Grotius has laid down a different rule with respect to criminal fugitives. But he is to be understood as speaking of the law of nature or the comity of nations, and not of the obligations of international law. He says (*b*), that "since sovereigns have the right of punishing offences which affect their honour or security, no foreign state ought to protect a fugitive who has been guilty of such an offence. But since it is not usual or convenient to allow any foreign power to enter the territory of a state with an armed force to seize an offender; the state in which he has taken refuge should either punish or surrender him, or at least compel him to leave the country. But, he adds, this right of demanding the surrender of criminals has been confined by the practice which has prevailed in most parts of Europe for some centuries, to offences of a political character, or of great enormity; it is usual to leave unnoticed offences of minor degree, unless it has been otherwise provided by treaty. Robbers and pirates when they have gathered such force as to be formidable, may with propriety be received and protected; for the interests of humanity require, that if it cannot be done otherwise, they may be turned from their evil ways by assurance of impunity." Now if the practice of surrendering criminals be referred to mutual consent or the comity of nations, it is easy to understand, why a sovereign should not solicit the surrender of any, but those whose offences are enormous, or such as affect his person or government. On any other supposition it is not easy to see, why a treaty which then would be only decla-

(b) Grot. ii. 21, iii. 4, 5—cf. Vatt. i. §§ 232, 233.

ratory, and in recognition of a pre-existing right, should occasion any difference in the practice. If the doctrine of Grotius be understood to be an exposition of legal right and legal obligation, it would be difficult to support it. The independence of states is inconsistent with the claim of any foreign potentate to exercise any jurisdiction or authority within their territories without their consent. The authority of a state within its own territories is absolute and exclusive. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source (*c*). It is not easy to conceive a power to execute a municipal law, or to enforce obedience without the circle in which that law operates. A power to seize for the infraction of the law is derived from the sovereign, and must be exercised within the limits which circumscribe the sovereign power (*d*). Bynkershoek accordingly confines the jurisdiction of a state to persons and things within its territory, or to its subjects in a foreign country, so far as the sovereign allows it to operate (*e*). Besides, if the surrender of a criminal were a legal duty, the option of sending him out of the country would not be allowable, for that would be an evasion of the duty. Nor is the option of punishing a fugitive easy to be understood; for that requires a state to take cognizance of offences, other than piracy, not committed within its juris-

(*c*) Wicq. i. 67; Bynk. F. L. ii.; Valin. Comm. i. 235; Vatt. ii. §§ 79, 83; *Church v. Hubbard*, 2 Cranch, 234; *Schooner Exchange*, 7 Cranch, 176.

(*d*) *Rose v. Hinely*, 4 Cranch, 278.

(*e*) Bynk. F. L. ii.; *id.* F. L. viii.



diction nor by its subject. It is true that pirates may be so punished, for they are the enemies of all countries and at all times, and therefore are universally subject to the extreme rights of war (*f*). Their case can hardly be deemed an exception to the general rule of jurisdiction, for they are rather to be considered as liable to be put to death *jure belli*; but they are selected by Grotius for protection when they are most deserving of punishment. Grotius's disquisition on the nature of punishment from which this doctrine is derived is a strange substitution of theological metaphors for legal principles (*g*). He argues, that although punishment can only be inflicted by a superior, yet every one who has not been guilty of a like offence has a moral superiority whereby he is competent to punish an offender, because such an one is degraded by his offences from the rank of men to that of brutes (*h*). He defines punishment to be evil suffered for evil done; but such evil may not be penal, but vindictive or injurious: if inflicted by the party injured it is vindictive; if by a stranger, it is a fresh injury. Punishment it cannot be, unless awarded by judicial authority derived from the sovereign. Legislative authority defines offences and assigns their punishment; judicial authority within the limits of its jurisdiction ascertains to whom offences are imputable, and awards the punishment assigned (*i*). The right of punishment is a right of sovereignty; it applies only to subjects, and has no place amongst equals (*j*). It is a vain imagination to suppose, that one independent state can under any circumstances have the right to punish another, or to punish any one that is not sub-

(*f*) *Le Louis*, 2 *Dod.* 244, per Sir W. Scott.

(*g*) *Heinecc. El.* 2, 159, (*n*); *Vatt.* ii. § 7.

(*h*) *Grot.* ii. 20, iii. 1.

(*i*) *Heinecc. El.* ii. 158, 159; *Puff.* viii. 3, iii.

(*j*) *Puff.* viii. 3, i.—viii. 3, §§ iii. iv.; *Heinecc. El.* ii. 156, 158, 159, 195, 198, (*n*); *Bynk. F. L.* ii.

ject to its jurisdiction (*k*). No law of any state can affect any right or interest of foreigners unless it be founded upon principles and impose regulations that are consistent with the law of nations. That is the only law that any state can apply to them, and the generality of any terms employed in any act must be narrowed in construction by a religious adherence thereto (*l*). It is this failure of jurisdiction and defect of judicial remedy, that, where wrong is done by states, gives the right of war (*m*). The consequences of this doctrine of Grotius, if it could be supported, would subvert the independence of nations. He holds that there is a degree of despotism on the part of a sovereign which will justify foreign invasion on behalf of his subjects (*n*). He attempts to sup-

(*k*) Puff. & Heinecc. *ubi supra*, the authorities collected by Grotius, ii. 20, xl. 4; Wicq. i. 67; Bynk. F. L. ii.; Vatt. ii. § 7.

(*l*) Le Louis, 2 Dod. 239.

(*m*) Grot. ii. 1, ii. 1; Heinecc. El. ii. 195.

(*n*) Est et illud controversum an justa sit belli causa pro subditis alicuius, et ab eis arceatur imperantis injuria. Sane ex quo civitates civiles institutæ sunt, certum est rectoribus cujusque speciale quoddam in suos jus quasitum. Thucydidis inter summi imperii signa posuit judiciorum summam potestatem, non minus quam legum et magistratum creandorum jus. Sed hæc omnia locum habent ubi vere delinquant subditi: adde etiã ubi dubia est causa. In hoc enim institum est ea imperiorum distributio. At non etiam, si manifesta est injuria: si quis Busiris, Phalaris, Thrax Diomedes ea in subditos exerceat, quæ æquo nulli probentur, ideo præclusum erit jus humanæ societatis. Gr. ii. 25, viii. Sciendum quoque est reges, et qui par regibus jus obtinent, jus habere pœnas poscendi non tantum ob injurias in se et subditos suos commissas; sed et ob eas, quod ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violent. Nam libertas humanæ societati per pœnas consulendi, quæ initio ut diximus penes singulos fuerat, civitatibus et judiciis institutis, penes summas potestates resedit; non proprie, quã aliis imperant, sed quã nemini parent. Nam subjectio aliis id jus abstulit. Eâtenus sententiam sequimur. Innocentii et aliorum—contra quam sentiunt Victoria, Vasquius, Argorius, Molina alii; qui ad justitiam belli requirere videntur, ut qui suscipit aut læsus sit in se aut in republicâ suâ: aut in eum, qui bello impetitur jurisdictionem habeat. Ponunt enim illi puniendi potestatem esse effectum

port it by referring to peculiar provisions of municipal laws; such as infants appearing by guardian, popular actions, and the like (*o*). But these being matters of municipal institution, can furnish no analogy in support of any rule of international law (*p*). The same reasoning which he applies to despotism is applicable to anarchy. The question, whether the disorders of a state have reached that degree, which will justify foreign interference for the purpose of punishment, of which Grotius suggests no measure, except that which is contained in the names of Phalaris and Diomede, could only be determined by the sovereign, who should take it upon himself to redress them. To do this he must assume cognizance of the internal disputes of an independent state, and have a right to invade its territories whenever he should think fit to declare; that interference is justifiable, and that he has taken arms to restrain despotism, or to suppress anarchy.

It is undoubtedly true, as Grotius argues, that no sovereign owes obedience to another (*q*), whence it follows, that no sovereign can exercise jurisdiction over another, or take cognizance of his domestic proceedings. The instances which he cites from ancient history (*r*), are in contradiction to modern usage; as appears from the examples collected in this chapter. There is no violation of the law of nations, for which more plausible precedents could not be quoted from modern history; but the usage of nations is to be deduced not from uniformity, but from preponderance of precedents, and from their conformity with established principles. Precedents drawn from

*proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ex jure naturali.* Grot. ii. 20, xl. vid. Grot. ii. 20, iii. i.; Heinecc. *contrapælu* in Grot. ii. 20, §§ 38, 40.

(*o*) Grot. ii. 21, iii.

(*p*) Heinecc. *El.* ii. 195, (s).

(*q*) *Impedimentum, quod resistere subditum prohibet, in alios non transit.* Grot. ii. 25, viii.

(*r*) *Ibid.*

ancient history are of no value, except as illustrative of the grounds and origin of modern usage.

In like manner with respect to commerce, it rests with the sovereign to prohibit or allow the importation of any kind of goods, or the carrying on of any kind of trade at his pleasure (*s*). This right has been very generally exercised by states, who have excluded foreigners from their coasting, fishing and colonial trades (*t*). When the United States passed a law which put a stop to their commerce with all the world, no other power complained of it, and the foreign government most affected by it and against whose interests it was immediately directed declared; that as a municipal regulation foreign states had no concern with it, and no right to make any complaint (*u*).

So as to what have been termed matters of innocent use, as the liberty of passage and navigation by land and by water. These are imperfect rights which, if denied, cannot be enforced. The sovereign is entitled to judge of the innocence of the use and to refuse or allow it at his pleasure. His consent cannot be compelled without a violation of his rights (*v*).

Grotius, indeed, asserts a right of passage over the territories of independent states, and that not merely for unarmed persons and for a pacific purpose, such as commerce or emigration; but for an armed force in the prosecution of a just war (*w*). But he is probably speaking only of the law of nature (*x*). In any other sense his doctrine would be inconsistent with the rights of sovereignty. So he appears to have been understood by Bynkershoek; *Rogo interea rationes illæ*

(*s*) Heinecc. El. ii. 169, 177, (*n*), 189, 196, 208, (*n*); Puff. iv. 6, x.; Valin, Comm. i. 217; Vatt. i. 90, 92, 94, 99.

(*t*) Church v. Hubbard, 2 Cranch, 235.

(*u*) Kent Comm. i. 32.

(*v*) Puff. iii. 3, v. 6; Vatt. i. 288—ii. 127, 128—iii. 120, 123; Heinecc. El. ii. 10, 196, 208.

(*w*) Grot. ii. 2, xiii.

(*x*) Vid. Grot. ii. 18, i.

facessant, ut et alia quas ceu ex naturali jure pro mari libero adferre placet, de commerciorum libertate, de facultate transeundi per mare liberâ, et quæ alia sunt sequioris notæ. Sed tamen miror cur non eodem acumine etiam terram, dominio subjici posse negent: vel sane iter viam actum sive pactis et stipulationibus per fundos omnes omnibus permittant; ita quippe abolitis tributis et vectigalibus ad simulacrum pristinae communionis res ocysus esset composita (*y*). It has been justly observed, that the instances which Grotius cites are not examples of the exercise of a lawful right, but of unlawful violence (*z*); that it is a gratuitous assumption, that the passage must be innocent; and that, if it were proved to be so, the owner of the territory is not bound to grant it. It is essential to the right of property, that the owner may refuse the use of it (*a*). Sine facultate alios usu rei excludendi non intelligitur dominium, ea igitur ad dominii essentiam pertinet (*b*). Transitum quamvis innoxium et inermem a domino recte prohiberi omnino dicendum; licet rursus contradicat *ὁ μὴ γὰρ* de jure belli et pacis libro ii. capite iii. s. xii. De terrâ marique illud ipse negat, sed nullo jure. Nemo, me invito, re meâ recte utitur fruitur: alia est humanitatis, alia juris regula (*c*). The territory of a state could in no sense be called its own, unless it had an exclusive right to its enjoyment (*d*). Consequently, every state has a right to refuse a passage over its territories, although such refusal may under some circumstances be an act of inhumanity (*e*). A military force can never gain immunities other than those which war gives by entering a foreign territory against the will of its sovereign. It is obvious, that the passage

(*y*) Bynk. D. M. ix.

(*z*) Gronov. ad Grot. ii. 2, xiii.

(*a*) Grot. par Barbey. ii. 2, xiii. (π).

(*b*) Heinecc. Prælec. ad Puff. i. xii. 3.

(*c*) Bynk. D. M. iv.

(*d*) Vatt. ii. § 79, 83; Church v. Hubbard, 2 Cranch, 234, per Marshall, C. J.

(*e*) Puff. iii. 3, v. 8.

of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominions it passed. Such a practice would break down some of the most decisive distinctions between peace and war; and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character; or of exposing itself to the frauds and stratagems of a power, whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these, that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force, and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility, and if not opposed by force acquires no privilege by its irregular and improper conduct. It may, however, be questioned, whether any other than the sovereign power of a state be capable of deciding, that the military commander of such an army is without a license. When a sovereign allows the troops of a foreign prince to pass through his dominions he is understood to waive a portion of his territorial jurisdiction. In such case without an express declaration waiving jurisdiction over the army, to which this right of passage has been granted; the sovereign, who should attempt to exercise it, would undoubtedly be considered as violating his faith. By the exercise of it the purpose, for which the free passage was granted, would be defeated: and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it is applicable, and would be withdrawn from the control of the sovereign, whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and inflict those punishments, which the government of his army requires.

If the consent of the sovereign, instead of being expressed by a particular license, be expressed by a general declaration, that all foreign troops may pass through a specified tract of country; every immunity that would be conferred by a special license would in like manner be conferred by such general permission (*f*). The passage of ships over territorial portions of the sea or external water is a thing less guarded, than the passage of armies over land, and for obvious reasons. An army in the strictest state of discipline can hardly pass into a country without great inconvenience to the inhabitants; roads are broken up, the price of provisions is raised; the sick are quartered on individuals, and a general uneasiness and terror are excited; but the passage of two or three vessels, or of a fleet over external water may be neither felt nor perceived. For this reason the act of passing inoffensively over such portions of water, without any violence committed there, is not considered as a violation of territory; permission is not usually required. Such waters are considered as the common thoroughfare of nations, though they may be so far territory, as that any actual exercise of hostility is prohibited therein (*g*).

So long as a state retains the right of self-government it does not forfeit its independence by contracting an unequal alliance, whereby some pre-eminence is conceded to its ally (*h*); nor by becoming a member of a federal union (*i*); nor by paying tribute (*j*); nor by accepting the protection of a foreign power (*k*). Nor do several states cease to be independent by being under one head; the proof of which is, that on the extinction of the reigning family the sovereignty reverts severally to each state (*l*).

(*f*) *Twee Gebroeders*, 3 Rob. 352.

(*g*) *Per Marshall*, C. J. *Schooner Exchange*, 7 Cranch, 139.

(*h*) *Grot. i. 3, xxi. i.*; *Vatt. iv. § 58.*

(*i*) *Grot. i. 3, vii. 2.*

(*j*) *Vatt. i. § 192—iv. § 58.*

(*k*) *Grot. i. 3, xxi. 1*; *Vatt. i. § 192—iv. § 58.*

(*l*) *Grot. i. 3, vii. 2.*

As every state is entitled to determine its own form of government, the identity and continuity of a state is not affected by any change therein (*m*). Nor is it affected by a national emigration to a new country (*n*); such as was practised by the German swarms, and was once contemplated by the Dutch. Nor in a monarchical government is it affected by the demise of the sovereign, for the heir is deemed to be one and the same person with his ancestor for all legal purposes (*o*). The public debts of a state are not affected by any change in the form of its government (*p*). Where a state is divided into distinct states, either by war or by mutual consent, the obligations to which it was liable are not affected by such division, and must be discharged either jointly or severally in rateable proportions (*q*). In like manner where two states are united, their several rights and obligations are not extinguished, but incorporated (*r*). Upon this principle, when Upper and Lower Alsace and other places, comprising two-thirds of a province, liable to a certain debt were ceded to France by the treaty of Munster; it was stipulated that France should pay two-thirds of the debt (*s*). The extinction of a state is not to be contemplated in modern times. The instances given by Grotius are furnished by the ferocity of the Greeks and Romans. It occurred, when a nation was expelled from its country and led into captivity, or where it was deprived of all independent authority and made a subject province (*t*).

The title which a state has to its territories may be acquired in three ways: First, by occupancy; Secondly, by cession; Thirdly, by prescription.

(*m*) Grot. ii. 9, viii. 1; Bynk. Q. J. P. ii. xxi. § 1.

(*n*) Grot. ii. 9, vii.; Puff. viii. 12, 1.

(*o*) Grot. ii. 9, xii.

(*p*) Grot. ii. 9, viii.; Puff. viii. 12, ii.; Heinecc. El. ii. 231.

(*q*) Grot. ii. 9, x.; Heinecc. El. ii. 231.

(*r*) Grot. ii. 9, ix.; Heinecc. El. ii. 231.

(*s*) Flass. iii. 129.

(*t*) Grot. ii. 9, vi.; Puff. viii. 12, ix.



First, occupancy is the only original mode by which title to territory can be acquired (*u*); cession is a mere transfer of title; and prescription, or long possession only raises a presumption of title acquired by occupancy or cession. All things unappropriated are capable of being acquired by title of occupancy, which requires continued possession with an appropriating mind. *Quod nullius est naturali ratione occupanti conceditur*. Mere intention is not enough; the intention must be accompanied with possession, and the title continues only so long as possession endures (*v*). Continuance of possession by mere intention is a fiction of civil laws, and has no place in the law of nations. It is not to be understood, however, says Bynkershoek, that possession cannot be continued, unless a man carry his moveables on his back like a tortoise, or be in a state of perpetual incubation on his land, like a hen upon her eggs. The possession of land is continued so long as the owner continues to use it for the purposes to which it is naturally adapted. If he build on it, if he sow it and reap the crops, if he fence it and exclude others from possession, if he uphold his buildings,—by these and the like means his possession is continued in his absence (*w*). This doctrine may be illustrated by the rules of the civil law respecting things that were in common, which are founded on the same principles. If a man erected a building on the sea shore, he might maintain an action against any one who disturbed his possession. But if he allowed it to go to ruin, he could not disturb the possession of another who had erected a new building on the same spot (*x*). Hence, the discoverers of islands or continents not inhabited, or only partially in-

(*u*) Grot. ii. 3, iv.; Puff. iv. 6, i. ii.; Heinecc. Prælec. in Puff. i. 12, vi.; Grot. Mar. lib. v.; Bynk. D. M. 1; The Fama, 5 Rob. 114.

(*v*) Grot. ii. 2, ii. v.—ii. 3, xi.—ii. 4, iii.; Bynk. D. M. 1; Puff. iv. 6, viii.

(*w*) Bynk. D. M. 1; Puff. iv. 6, iii.

(*x*) Papinian apud Bynk. D. M. ix., and Grot. ii. 3, xi., and Mar. Lib. vii.

habited by savages, acquire for their sovereigns an inchoate title by setting up a flag or other ensign of occupancy; but the title must be completed by actual possession, and is deemed to be abandoned if not so completed, in which case the land is open to a fresh occupant (*y*). Unoccupied lands within the territory of a state are not subject to occupancy, for they are deemed to be in the possession of the state or its grantees (*z*). Sea fisheries are subject to occupancy, and capable of exclusive possession (*a*). The sea within gun shot of the shore is occupied by the occupation of the coast (*b*). Beyond this limit maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions, for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are the English hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination (*c*). By the laws of the United States this right is claimed to the extent of four leagues from the coast; and the claim of the Portuguese to exercise the like right to the same extent for the protection of their colonial trade, was recognised by the Supreme Court (*d*).

The controversy respecting the freedom of the sea, if it ever possessed any practical importance, cannot in the present day be regarded in any other light, than as a mere legal curiosity. In practical result there is no material difference between the doctrines of Grotius and those of Bynkershoek.

(*y*) Grot. ii. 2, iv.—ii. 3, iv.; Puff. iv. 6, iv.; Vatt. i. §§ 207, 208, 209, 295.

(*z*) Grot. ii. 2, iv.; Puff. iv. 6, iv.; Vatt. ii. § 86.

(*a*) Puff. iv. 4, vii. 8; Heinecc. El. i. 244; Vatt. i. § 287.

(*b*) Grot. ii. 3, xiii.; Bynk. D. M. 2; Vatt. i. § 289, 290; *The Anna*, 5 Rob. 385 (*c*); Kent Comm. i. 29.

(*c*) *Le Louis*, 2 Dod. 245.

(*d*) *Church v. Hubbard*, 2 Cranch, 234.

The discussion serves to display the logical acuteness of the latter; but it may be doubted whether the necessary consequences of his theory, which he was too acute a reasoner not to perceive and too fair a reasoner not to disclose, does not furnish a *reductio ad absurdum* in confutation of so much of his argument as maintains, that inland seas are still open to occupancy with all its exclusive effects. He argues that the sea, so far as it is not commanded by the coast and has not been reduced into possession, is still liable to appropriation by occupancy. After shewing that the fleets maintained by the Romans for that purpose, were sufficient to vest in them the sovereignty of the Mediterranean and British seas, he justly rejects the claims set up at different times, by the English to the British Channel; by Louis 14 to the Mediterranean; by the Venetians and Genoese to the Gulfs of Venice and Genoa; and by the Spanish and Portuguese to the Western and Eastern Oceans. These claims, if not all equally extravagant, were equally groundless; because they were never upheld after the manner of the Romans by an adequate fleet and uninterrupted possession. The ocean and the principal parts thereof, as the Atlantic, for example, he maintains to have been always unappropriated; being in their nature incapable of appropriation, because incapable of uninterrupted possession by adequate force.

But besides those parts of the ocean which adjoin the land, and are appropriated as accessory to the coast, that commands them: he maintains, that inland seas, including the Mediterranean, are still capable of appropriation though at present unappropriated. Hence it follows, that any one navigating the Mediterranean in a single vessel with an appropriating mind would acquire a title by occupancy so long as his navigation endured to so much of the sea as it comprised; and might repel by force and confiscate the vessels of any persons, who disturbed his possession (*e*).

(*e*) Bynk. D. M. iii. *Dominii maritimi titulum diximus esse occupa-*

Such circumstances would hardly amount to a defence in an indictment for piracy. It is hard to understand, how those parts of the sea, which are unoccupied and not parcel of the territories of any state can be subject to appropriation, so as to exclude the right of navigation, which is exercised without intermission by all the world. The doctrine of the civil law, that the sea is not subject to servitudes is wholly inapplicable. The distinction of Heineccius seems to reconcile all material differences concerning this question. He holds, that the ocean is incapable of appropriation; but that parts of the ocean and narrow seas may be appropriated subject to the right of navigation (*f*).

This distinction, however, must be supported on other grounds than those, upon which Heineccius rests it. He puts it upon the principle of the inexhaustible nature of the use, which would equally give a right of passage by land or by water over the territories of a sovereign without his consent and against his will (*g*). But it may be supported on the principles maintained by Bynkershoek. For if occupancy be capable of giving an exclusive and absolute right to seas and parts of the ocean for all purposes, much more must it be capable of giving a qualified right for a special purpose. Bynkershoek maintains, in opposition to Vasquez and Grotius, that the sea is not in its nature imprescriptible (*h*). But the fact of any prescriptive right, he says, is impugned by the cir-

tionem. Hæc autem justa non est, nisi quærat aut justo bello, aut navigatione maris, cujus possessio non occupata est vel derelicta. Unde si quis, vel unâ scaphâ occupet mare non occupatum et possessum prius, isque eâdem scaphâ domini animo, pergat navigare idem mare, non ille nisi injuriâ eo submovebitur, non secus ac si quis occupato post primam communionem fundo invitatus depellatur. Ut quisque possidet, ita quominus possideat vim fieri veto: si deturbetur et injuriæ par sit poterit vim vi repellere.

(*f*) Heinecc. El. ii. 277, (*n*); Prælec. in Puff. i. 12, 4—cf. Grot. ii. 3, xii.

(*g*) Bynk. D. M. ix.

(*h*) Bynk. D. M. vi.

cumstance, that all nations navigate where they will without regard to any exclusive claims. This circumstance seems rather to point to a prescriptive right of navigation. All nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state nor any of its subjects, has a right to assume authority over the subjects of another (i). But Bynkershoek's main principle is, that the right of occupancy is commensurate with possession, and ceases only when possession is abandoned. But possession must be such as its purpose and the nature of the subject admit; and as he does not require for the possession of land, that the owner should incubate upon it like a hen, so neither could he require for the possession of a navigation, that the navigator should be inherent in his vessel like a Nautilus. If the subjects of one or all states navigate as often as they have occasion, that must be sufficient to maintain one or all states in possession of the navigation; and if uninterrupted navigation from time immemorial were necessary, that is not wanting. The right of occupancy is founded upon the maxim—in *pari jure potior est conditio possidentis*—and no reason can be given why a state which is in possession of a navigation should be excluded by those who have no better title. Upon this principle it is laid down by Vattel, that where several nations have occupied a fishery, no one of them has a right to exclude the others (j); and fisheries are nothing more than a qualified possession of the sea for a special purpose.

Secondly, cession is a mode of acquiring title, which requires no explanation. It demands the union of possession and right, which occurs where one party having possession and right transfers both to the other, or where the party

(i) *Le Louis*, 2 Dod. 243.

(j) *Vatt.* i. § 287.

having right being dispossessed transfers the right to the party in possession, or has the possession restored to him. This subject will be more properly treated in connection with treaties which are the instruments of cession.

Thirdly, Prescription, in the strict sense of the word, as it implies some definite period of time, is the creature of civil laws (*k*). But the principle of prescription applies no less forcibly to national than to private possessions: as the quieting of titles is no where more important, than where sovereigns are concerned (*l*). It is, indeed, true as a principle, *quod non valet ab initio tractu temporis non convalescit*: yet in practice something different must be observed; a title, which may have been originally faulty, must of necessity become unimpeachable by great lapse of time (*m*). Hence, the greatest authorities agree, that national possessions may be prescribed for when length of possession has been accompanied with those circumstances which raise a presumption of right (*n*). Title by occupancy, as has been before stated, ceases with possession, and a new occupier acquires a title by occupancy (*o*). Length of possession raises a presumption of title, because it is not to be supposed that the former owner would allow another to be in possession, unless he had abandoned or ceded his right (*p*). Where a loss must fall upon one of two innocent parties, it is reasonable that it should fall upon him who has neglected his rights (*q*). Ignorance of the fact cannot be alleged between sovereigns, because national possessions are too notorious to be

(*k*) Vasq. apud Grot. Mar. Lib. vii.; Heinecc. Prælec. in Puff. i. 12, xv.

(*l*) Grot. ii. 4, viii. 3; Puff. iv. 12, xi.; Vatt. ii. § 147.

(*m*) Per Sir W. Scott, *The Molly*, 1 Dod. 394; Vatt. i. § 266, 4.

(*n*) Grot. ii. 4, i.; Puff. iv. 12, ii.; Bynk. D. M. vi.; Heinecc. Prælec. in Puff. i. 12, xv.; Heineccius infers title by occupancy, where the authorities above cited support title by prescription. The distinction is merely verbal.

(*o*) Grot. ii. 3, xix.

(*p*) Grot. ii. 4, viii.; Vatt. ii. §§ 140, 146, 149.

(*q*) Vatt. ii. § 141.

unknown (*r*). Immemorial possession raises a conclusive presumption of title: a presumption *juris et de jure*, which admits of no proof to rebut it; for the right of possession must prevail until a better title is shewn, and immemorial possession is legally presumed to have survived all proof of title on either side (*s*). But the conclusive effect of immemorial possession is not to be considered as resting upon a mere presumption of fact, but upon a peremptory rule of the law of nations, established by general usage as essential to the general peace (*t*). So a claimant of territory contracting with the sovereign in possession, as with the owner thereof, is taken to have abandoned his right (*u*). So a party concurring in any act, or authorizing or requiring it to be done, is taken to admit all that is necessary to give it validity (*v*). Thus the conclusion of a treaty is a recognition of sovereignty in the party with whom the treaty is made; for a treaty is an act of sovereignty. So of the reception of an ambassador (*w*). Hence, the Spanish ministers, in the passports given to the deputies of the United Provinces, at the congress of Munster, refused to style them ambassadors, as that would have been an acknowledgment of independence and sovereignty, which was to be one of the subjects of negotiation (*x*).

The proof which is required to support title by prescription varies with the nature of the subject prescribed for. On subjects where a general or a common use is to be presumed, the claim of private or exclusive property is against the general inclination of the law. With regard to rivers or the sea, such claim can only arise on portions of the sea, or on rivers flowing through different states. The law of rivers flowing entirely through one state is perfectly clear.

(*r*) Puff. iv. 12, xi.

(*s*) Grot. ii. 4, ix.; Vatt. ii. §§ 143, 149.

(*t*) Grot. ii. 4, ix.; Vatt. ii. § 150.

(*u*) Grot. ii. 4, iv.

(*w*) Wicq. i. 18.

(*v*) Grot. ii. 4, iv

(*x*) Wicq. i. 130, 407.

In the sea out of reach of cannon shot universal use is presumed. In rivers flowing through conterminous states a common use is presumed. Yet in both of these there may, by legal possibility, exist a peculiar property excluding the universal or common use. Portions of the sea are prescribed for: so are rivers flowing through contiguous states (*y*).

In conterminous waters, accretions that arise imperceptibly accrue to the adjoining territory (*z*). But in the case of a violent avulsion of land, which is capable of being identified (*a*), or where parts of a territory are flooded by conterminous water (*b*), the former title continues. When a conterminous river is naturally or artificially diverted into a new course, the boundary follows the middle of its deserted channel (*c*). In the absence of any proof to the contrary the boundary is presumed to run along the middle of the conterminous water (*d*). But the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have take place upon conquests or other events (*y*). The general presumption bears strongly against such exclusive rights, and the title is a matter to be established by those claiming under it, in the same manner as all other legal demands, are to be substantiated by clear and competent evidence. The usual manner of establishing such a claim, is either by the express recorded acknowledgment of the conterminous state, or by the ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement or of subsequent cession. Ancient jurisdiction is proved by formal acts of authority; by holding courts of conservancy of the navigation; by ceremonious processions to

(*y*) Twee Gebroeders, 3 Rob. 339.

(*z*) Grot. ii. 3, xvi.; Vatt. i. §§ 268, 269.

(*a*) Vatt. i. §§ 268, 269, 275.

(*b*) Vatt. i. § 275.

(*c*) Grot. ii. 3, xvii.; Vatt. i. §§ 267, 269, 270, 277.

(*d*) Grot. ii. 3, xviii.; Vatt. i. § 266; Twee Gebroeders, 3 Rob. 333.



ascertain the boundaries in the nature of perambulations; by marked distinctions on maps and charts prepared under public inspection and control; by levying tolls; by exclusive fisheries; by permanent visible marks of power there established; by the appointment of officers specially designated to that station; by stationary guardships; by records and muniments, shewing that the right has always been asserted, and, whenever resisted, asserted with effect. This is the natural evidence which it is reasonable to require whenever a right is claimed against all general principles, and against the natural rights and limits of neighbouring states (e). The laying down of buoys and beacons is not in its nature to be considered as a necessary indication of territory; it may be a servitude, or it may be neither; it may be, that the navigation is one in which neighbours are much interested, and the owner comparatively little, and, therefore, content to leave the care and expense of it upon them (f).

(e) *Twee Gebroeders*, 3 Rob. 336.

(f) *Ibid.*

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## CHAPTER III.

## OF PUBLIC MINISTERS AND CONSULS.

THE subject of public ministers may be considered with regard to ; first, Their mission and reception ; secondly, Their different orders and precedence ; thirdly, Their privileges ; fourthly, The claim of asylum and jurisdiction over their train.

First, An ambassador is the representative of an independent state or sovereign in the territories of another (*a*). Ambassadors differ from other public ministers only in respect of rank and ceremonial, and in the circumstance that the former only have a representative character (*b*). A minister is furnished with two sets of papers,—his credentials and his instructions ; of which the former are ostensible, the latter secret (*c*). Credentials are essential, as they are the necessary and only proof of public character ; and the diplomatic rank of a minister depends upon the title by which he is designated therein (*d*). Ambassadors are accredited to the sovereign ; hence ambassadors accredited to confederate states have several credentials for each. Thus ambassadors accredited to Switzerland were furnished with credentials for the cantons in general, for each particular canton ; for the Protestant cantons, and for the Catholic cantons (*e*). A minister cannot be required to disclose

(*a*) Wicq. i. 5 ; Vatt. iv. § 71.

(*b*) Wicq. i. 118, 855 ; Bynk. F. L. i. xiii.

(*c*) Wicq. ii. 54 ; Bynk. Q. J. P. ii. vii.

(*d*) Wicq. i. 137, 356, *et seq.* 372, *et seq.* 673 ; Bynk. F. L. xiii. ; Vatt. iv. § 76.

(*e*) Wicq. i. 375.

his instructions (*f*); but circumstances may rarely occur in which he would be justified in giving extracts, or in communicating them in detail (*g*). A minister who is instructed to negotiate, is furnished with powers for that purpose; and he is a plenipotentiary or not, accordingly, as his powers are plenary or limited (*h*). Joint powers must be jointly exercised (*i*).

The law of nations does not require the indiscriminate reception of all ambassadors, but forbids their reception to be refused without just cause (*j*). Gustavus Adolphus set forth as one of his grounds of war against the Emperor of Germany, that he had refused to receive the Swedish ambassadors, and had forbidden them to enter Germany on pain of death (*k*). When there is just cause of refusal, the mission of an ambassador may be prohibited, either absolutely or conditionally. For every one may abridge his own right; and when a sovereign has a right to prohibit, he may propose conditions on which he is willing to waive such prohibition. But if an ambassador be received unconditionally, he is entitled to all the privileges that attach to his office: *cæterem admissa legatio etiam apud hostes, tanti magis apud inimicos præsidium habit juris gentium* (*l*). The reasonableness of this rule is obvious. A sovereign who has just cause of objection, may either insist upon it or waive it; but if he receive an ambassador without intimating any objection, his option is determined, otherwise there would be a want of reciprocity. For the sovereign who sends an ambassador, upon objection made either absolutely or

(*f*) Wicq. i. 354, 355.

(*g*) Wicq. ii. 54, 125, 159.

(*h*) Wicq. i. 377, 382, 392.

(*i*) Wicq. i. 386.

(*j*) Grot. ii. 18, iii.; Wicq. i. 308, 317, 323, 328; Bynk. Q. J. P. ii. v.; Vatt. iv. § 65.

(*k*) Wicq. i. 316.

(*l*) Grot. ii. 18, vi.; Puff. viii. xi. iii.; Wicq. i. s. xi.; Vatt. iv. § 112; Martens Man. dip. § 23.

conditionally, has the option of substituting another, or of accepting the conditions proposed. But if the sovereign to whom he is sent could receive him without giving notice of any objection, and afterwards impose conditions, the sovereign who sends the ambassador would have no opportunity of exercising his option.

It is impossible to conceive, says Vattel, that a prince who sends an ambassador or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, that gives new force to the natural obligation (*m*).

Bynkershoek excepts from this rule the case of an ambassador, who is a subject of the sovereign to whom he is sent (*n*). But this seems emphatically within the reason thereof; for the fact is peculiarly within the knowledge of the sovereign, whose subject he is. Part of the reasons which he alleges in support of this exception, are in direct contradiction to those on which he maintains the general privileges of ambassadors, and the weight of reason and authority is against it. But if a minister be allowed to accept an appointment from the sovereign to whom he is accredited, he must be taken to waive, with the consent of his sovereign, so much of his privilege as is inconsistent with the duties of such appointment (*o*).

(*m*) Cited by Marshall, C. J., *arguendo* *Schooner Exchange*, 7 Cranch, 143.

(*n*) Bynk. F. L. xi.—*contra* Puff. viii. xi. 3; Wicq. i. xi.; Vatt. iv. § 112; Martens Man. dip. § 23.

(*o*) Vatt. iv. § 112.

Bynkershoek goes yet further, and lays down a doctrine peculiar to himself, not in accordance with the usage of nations, and more than doubtful on abstract principles, on which alone he attempts to support it (*p*). He argues that the privilege of ambassadors arises from the tacit obligation or implied contract annexed to their reception; and that, according to the maxim *expressum cessare facit tacitum*, any state may extinguish their privileges by making a law that no ambassador shall be received except on condition of subjection (*q*). But no state can vary the law of nations by its own private ordinances: no nation can privilege itself to commit a crime against the law of nations by a municipal regulation of its own (*r*). It is true that an ambassador would be entitled to no privilege, if he were accredited with a knowledge of such an ordinance; for that would amount to a waiver of privilege on the part of himself and his sovereign. But the question is, whether a sovereign can of right refuse to receive any ambassador except on such condition. He gives no instance of the exercise of such pretended right; and he approves and adopts the principle of Grotius, that the reception of a public minister cannot be refused without just cause. But to deny him the privileges which are essential to the performance of his functions is equivalent to a refusal to receive him. And if the reception of a public minister, to which there is no just ground of objection, be a duty imposed by the law of nations, he ought to have shewn on what principle a sovereign can annex arbitrary conditions to the performance of a legal duty, and restrain at his pleasure the legal consequences of an act which the law requires him to perform. The assent of a sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the consideration,

(*p*) F. L. viii. p. 158, xix. p. 176.

(*q*) Vatt. iv. § 106, *contra*.

(*r*) *Le Louis*, 2 Dod. 251.—cf. Grot. iii. 9, xvii.

that without such exemption every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power, and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain: privileges which are essential to the dignity of his sovereign, and to the duties which an ambassador is bound to perform (*s*).

The argument of Bynkershoek assumes that the reception of a minister, and, consequently, the terms on which he is to be received, are *res integra*, until his reception is completed. And so it might possibly be considered, if the state receiving him had never in its intercourse with foreign states had the benefit of those privileges in the persons of its own ministers. So restricted, the doctrine would be of little importance, otherwise the maxim applies *abstine commodum si damnum metius* (*t*). There is little danger of any attempt to act upon this doctrine. If a sovereign were to notify such condition to a single state, it would be an insult to its sovereign, and the insult would be aggravated by its singularity. If he were to notify it to all states, it could hardly be regarded otherwise than as an insult to all sovereigns; and the least that he could expect in resentment of such an insolent pretension would be the dismissal of his ministers from all Courts.

Objections to the reception of an ambassador may apply: first, to him who sends; secondly, to him who is sent; thirdly, to the objects of his mission.

First, the right of employing ambassadors and other public

(*s*) Schooner Exchange, 7 Cranch, 138.

(*t*) Bynk. Q. J. P. viii. *Abstine commodum, etc., ipsa juris gentium, non sola Ulpiani, vox est.*

ministers is a right of sovereignty, and a minister cannot be received without recognizing the sovereignty of the government that employs him (*u*). Thus, Pope Paul 4 refused to receive the ambassadors of the Emperor Ferdinand, because the validity of his election was disputed by the Roman see (*v*). So Pope Clement 8 refused to receive the ambassador of Henry 4, before his reconciliation with the church of Rome (*w*). So the Protestant princes of Germany and the King of Denmark refused to receive the nuncio of Pius 4, because they did not acknowledge the spiritual supremacy of the Pope, who in his credentials had designated them as his sons (*x*). So the King of Spain refused the title of ambassadors to the deputies of the Low Countries at the Congress of Munster (*y*). So Charles 2 declared that he would not receive the ambassadors of Don Pedro, until he should be satisfied that Don Pedro was in lawful possession of royal authority, either as King or Regent of Portugal (*z*). Upon the same principle, the lawyers consulted by Queen Elizabeth in the Bishop of Rosse's case, replied to the second question put to them, that a sovereign, who hath been lawfully deposed, cannot invest his minister with a public character (*a*). Hence, to recognize the minister of a deposed sovereign, is to dispute the title of the government by which he has been superseded. Thus Cardinal Mazarin, having received Lockhart as Cromwell's ambassador, refused to receive the ambassador of Charles 2 at the Congress of the Pyrenees (*b*). So the Porte dismissed the ambassador of Charles 1, on the reception of the ambassador of the Parliament (*c*). But the ambassadors of the titular Kings of Denmark, Hungary, and Navarre were received at many courts (*d*). In such cases, foreign states are always at liberty to recognize the govern-

(*u*) Wicq. i. 130, 140.

(*v*) Wicq. i. 314.

(*w*) Wicq. i. 308.

(*x*) Wicq. i. 329, 333.

(*y*) Wicq. i. 59—ii. 122.

(*z*) Life of Sir L. Jenkins, ii. 689.

(*a*) Camd. El. an. 1575.

(*b*) Wicq. i. 56; Vatt. iv. 68.

(*c*) Wicq. i. 840.

(*d*) Wicq. i. 63.

ment which is in the actual possession of sovereignty; for lawful title, as it has been before stated, may be inferred from possession.

The reception of an ambassador, or the ratification of a treaty, is a recognition of sovereignty; for the recognition of any act is a recognition of all that is necessary to its validity; and such acts are acts of sovereignty. Thus, France and England recognised the independence of the United Provinces by receiving their ambassadors (*e*). So Charles 1 recognised the independence of Portugal by receiving the ambassador of John 4 (*f*). France, by a treaty of alliance and commerce, recognised the independence of the United States. The difficulty that arises in the case of civil dissensions, hath been formerly treated at large (*g*). In like manner, objections to the reception of an ambassador may arise from the conduct of his sovereign. Ferdinand the Catholic, having refused to ratify the treaty of Blois, on the false pretence that Philip of Austria had exceeded his powers in executing it, Louis 12 received Ferdinand's ambassadors only to reproach them with his treachery, to refuse all intercourse with their master until he should have ratified the treaty, and to order them to quit the kingdom the same day (*h*). So Queen Elizabeth refused to receive the ambassador of King James, because her ambassador had not been well treated in Scotland (*i*). So Charles Gustavus, King of Sweden, having learned that the Elector of Brandeburgh had formed an alliance with the King of Poland, in the hope of obtaining the sovereignty of Prussia, refused to receive his ambassador, alleging that a sovereign is not bound to receive the ambassadors of his enemies (*j*). For the like reason the Elector Palatine refused to receive the ambassador of Archduke Albert (*k*). So the King of

(*e*) Wicq. i. 18.

(*f*) Wicq. i. 58.

(*g*) c. ii.

(*h*) Wicq. ii. 392.

(*i*) Wicq. i. 339.

(*j*) Wicq. i. 320.

(*k*) Wicq. i. 316.



Castile refused to receive the ambassador of the King of Arragon, whom he believed to be preparing to make war upon him (*l*).

The power of appointing ambassadors is usually delegated by sovereigns to the governors of distant provinces. The ambassadors whom they appoint, are ambassadors of the sovereign for the affairs of such governments (*m*). This power was exercised by the Spanish governors of the Low Countries and the viceroys of Naples. In 1561, Queen Elizabeth having got possession of money remitted by the King of Spain to the Duke of Alva, refused to receive his ambassador, on the ground, that sovereigns only are entitled to employ ambassadors. Bynkershoek observes, that the fact itself shews, that she resorted to this pretence to avoid restitution (*n*); and it is to be observed, that England was deeply interested in preventing the subjugation of the Low Countries. In 1588, the English ministers in Flanders made no difficulty in negotiating with the Spanish ambassadors, whose powers were only signed by the governor of the Low Countries. During minorities and interregnums, the appointment of public ministers is vested in those by whom the powers of sovereignty are exercised. During the vacancy of the see of Rome, the power is vested in the conclave (*o*). During the captivity of King John and King Francis 1, ambassadors were appointed by the Dauphin and Queen-mother as Regents (*p*). Grotius was appointed ambassador to France by Chancellor Oxenstiern in the character of Regent, after the death of Gustavus Adolphus, by whom he had been designated to that office (*q*).

Secondly, Reception may be refused on the ground of per-

(*l*) Wicq. i. 324.

(*m*) Wicq. i. 61, 71; Vatt. iv. § 61.

(*n*) Bynk. Q. J. P. ii. 3.

(*o*) Wicq. i. 71; Vatt. iv. 61, 62.

(*p*) Wicq. i. 71.

(*q*) Wicq. i. 74.

sonal character. If a person sentenced to punishment, were accredited to the state within whose jurisdiction the sentence had been passed, but not executed, that would be a just ground of objection. For no sovereign can be required to abandon his jurisdiction over his own subjects. On the same ground, a sovereign may justly refuse to receive his own subject as minister of a foreign state; accordingly, by the laws of France and Holland, subjects were forbidden to accept such appointments (*r*). A person who had been in the service of the Dutch East India Company, and condemned in India to have his tongue bored, was sent to Holland to negotiate a settlement of differences between the King of England and the company. On his arrival he was imprisoned, but soon afterwards released and sent out of the country. His imprisonment was illegal; but there can be no doubt of the legality of the refusal to admit him in a public character (*s*). So, if an ambassador have given just cause of offence or be personally obnoxious to the sovereign to whom he is accredited. Upon this ground, Cardinal Richelieu warned the English ambassador at Paris, that the Duke of Buckingham would not be received as ambassador extraordinary (*t*). So Charles 8, refused to receive Cardinal Piccolomini as legate (*u*). So Ferdinand sent Andrea del Borgo out of Spain the instant he landed, when the Emperor Maximilian had sent him in spite of a previous request that he never might be accredited again (*v*). Francis 1 refused Cardinal Pole as legate, on the ground that he was the personal enemy of Henry 8, who was at that time an ally of the King of France (*w*).

Thirdly, the reception of an ambassador may be refused, when the purpose of his mission is liable to suspicion as contrary to the honour or interest of the state (*x*). Thus, the

(*r*) Bynk. F. L. xi.; Wicq. *contra*, i. 268.

(*s*) Bynk. Q. J. P. ii. v.

(*v*) Wicq. i. 337.

(*t*) Wicq. i. 324.

(*w*) Wicq. *ibid*.

(*u*) Wicq. i. 326.

(*x*) Grot. ii. 18, iii. 2.

Sicilians refused to admit the ambassadors, whom the Pope had sent to exhort them to make their peace with Charles of Anjou (*y*). So the United Provinces, both before and after the union of Utrecht, refused to admit the ambassadors of the emperor and of several German princes, as bearers of proposals, which could not be accepted with honour (*z*). So Queen Elizabeth refused to receive the nuncio sent by Pope Pius 4, to invite her to appoint deputies to the Council of Trent; because the nuncio, under that pretence, was sent to stir up her subjects to revolt. She added, that such refusal was not unprecedented, as Queen Mary, though a Catholic, had refused to admit the messenger, who was bringing a cardinal's hat to her confessor (*a*). Philip and Mary refused to receive Cardinal Pole as legate, until he had satisfied them that the purpose of his mission was not inconsistent with their interests (*b*).

Grotius lays it down that ordinary ambassadors may be disallowed, because the practice of the ancients, to whom they were unknown, shews how little they are required (*c*). Wicquefort says, that they are not within the protection of the law of nations, because they were unknown less than two hundred years before his time, and that the refusal to receive an ordinary ambassador would be unusual but not unlawful (*d*). Ordinary embassies are certainly of modern origin; so late as the year 1651, they were brought in question at an extraordinary meeting of the States General, but nothing was determined, and the matter was adjourned to their ordinary session (*e*). But it must be remembered, that as the usage of nations changes, the law of nations changes with it; and that much is law now, that was not so formerly (*f*). That ordinary embassies are in accordance with modern usage can not

(*y*) Wicq. i. 319.

(*z*) Wicq. i. 333.

(*a*) Wicq. i. 332.

(*b*) Wicq. i. 229.

(*c*) Grot. ii. 18, iii. 2.

(*d*) Wicq. i. 16.

(*e*) Bynk. F. L. 1.

(*f*) Bynk. Q. J. P. pref. and ii. vii.

be doubted, when they have been in use without interruption for more than two hundred years. The designation of public ministers shews the inveteracy of the practice, for none are termed extraordinary, but those whose mission is special. The practice of the Romans is nothing to the purpose; for there is no analogy between the unity of the Roman empire with little or no intercourse beyond its boundaries, and the numerous states into which modern Europe is divided. The complicated political and commercial relations of modern states are continually giving rise to international questions, and require all the attention of resident ambassadors to settle disputes and watch over the interests of their sovereigns at each other's courts (*g*).

Secondly, With respect to the precedence of ambassadors. As the entire independence and perfect equality of separate states is a fundamental principle of the law of nations, it might be supposed that the perfect equality of their representatives would be inferred as a necessary consequence, and that the peace of courts never could be disturbed by disputes respecting precedence amongst equals. Yet such disputes have occurred continually, and have been attended sometimes with ludicrous, but more frequently with fatal consequences. From the period of the abdication of Charles 5, the ambassadors of France and Spain contended for precedence in every Court of Europe, except at Vienna, where precedence was given to the Spanish ambassador from family considerations (*h*). At the public entry of the Swedish ambassador into London, a contest for precedence took place, which was attended with loss of life on both sides, and probably would have led to war, if the King of Spain, who was interested in maintaining peace with France, had not made such submissions as satisfied the pride of Louis 14 (*i*). But these disputes were not confined to the

(*g*) Bynk. F. L. i.

(*h*) Wicq. i. 684, 685; Bynk. Q. J. P. ii. ix.

(*i*) Wicq. i. 723; Bynk. Q. J. P. ii. ix.

greater powers. The ambassadors of two Italian princes met on a bridge at Prague, and as neither would give way, they stood for the greater part of the day face to face, exposed to the jeers of the crowd collected by the strangeness of the spectacle (*j*).

However the regulations agreed on by the plenipotentiaries assembled at Vienna and Aix-la-Chapelle, and inserted in the acts of those congresses, seem calculated to prevent such scandal for the future. These acts provide, that diplomatic persons shall be divided into four orders, of which the first only has a representative character.

First, Ambassadors, legates, and nuncios.

Secondly, Envoys, ministers plenipotentiary, and other diplomatic persons accredited to sovereigns, except ministers resident.

Thirdly, Ministers resident.

Fourthly, *Chargés d'affaires* accredited to ministers for foreign affairs. These regulations are made with a reservation of the rights of the representatives of the Pope (*k*).

The rank of diplomatic persons is to be determined by the order to which they belong, and the precedence of those who belong to the same order by seniority, according to the dates of their respective notifications of arrival. No distinction is to be allowed either on account of extraordinary missions, or on account of the domestic relations or political alliances of Courts (*l*).

In the execution of instruments to which more than two states are parties, the order of nomination and signature is to be determined by lot. It was unnecessary to provide for the case of two contracting parties; for by established usage each state is first named, and the signature of its minister stands first, and its own language is employed in the original to be

(*j*) Bynk. Q. J. P. ii. ix.

(*k*) Mart. Man. dip. § 38 ; vid. Vatt. iv. § 71, *et seq.*

(*l*) Mart. *ibid.*

deposited in its own archives (*m*). The minister of a mediating power is usually allowed precedence among ministers of the same rank (*n*).

Thirdly, With respect to the privileges of ministers. All persons accredited by an independent state are entitled to all the privileges of ambassadors, whether their mission be ordinary or extraordinary. All are equally under the protection of the public faith; and whether a sovereign send an ambassador, or think proper for the purpose of saving expense, or from any other motive, to send a minister of lower degree, whoever is accredited has the same rights and privileges (*o*).

There seems to be little weight in the objections that have been urged against the privileges of ambassadors. The arguments on both sides are fully discussed by Bynkershoek (*p*). If it be alleged that it is hard that an ambassador should be allowed to carry off the property of his creditors, and to drive them for their remedy to the Courts of his own country, that he should be allowed to sue and yet not be liable to be sued, it is answered, that creditors are bound to inform themselves of the condition and privileges of those to whom they give credit, and that if they neglect to do so, they have no right to complain of the consequences of their own negligence (*q*). Albericus Gentilis suggests, that if an ambassador cannot be sued, no one will deal with him; to this it is answered, that others, who are not liable to be sued, have no difficulty in obtaining credit (*r*), and that it is his business to see that his privilege does not operate to his prejudice, which he may always do by not requiring credit, or by finding sureties (*s*).

If an ambassador were subject to the jurisdiction of the

(*m*) Wicq. ii. 70; Mart. Man. dip. §§ 78—87, 3, 4.

(*n*) Mart. Man. dip. § 38.

(*o*) Wicq. i. 109, *et seq.*; Bynk. F. L. i. xiii.; Vatt. iv. § 81.

(*p*) Bynk. F. L. vii.

(*q*) Wicq. i. 839; Bynk. F. L. vii.

(*r*) Grot. ii. 18, x.; Wicq. i. 839.

(*s*) Bynk. F. L. vii.

country in which he is resident, he must be subject to judgment in all its effects, and amongst others, to imprisonment, to the total obstruction of his functions (*t*). In regard to criminal jurisdiction, the public benefit which is derived from the security of ambassadors outweighs any mischief that can ensue from their impunity (*u*). Besides the interest of him who sends, and of him who receives an ambassador, are often different, and frequently hostile; and something might always be alleged against an ambassador that might be construed into an offence. Where any offence has been committed by him, redress may be demanded of his sovereign, and where the matter is of sufficient importance it may be enforced by war (*v*). It is true that in some cases, as for instance where an ambassador, pursuant to his instructions, has conspired against the sovereign to whom he is accredited, he has nothing to fear from his own sovereign. But such cases are rare, and their mischief is compensated by the general benefit of the rule (*w*).

Public ministers are the necessary organs of national intercourse, and the purpose of their ministry could not be obtained, if they were not strengthened by all the prerogatives that are essential to enable them securely to perform their duties with fidelity and freedom. The same law of nations, that requires the reception of public ministers, also requires, that they should be invested with all the privileges that are necessary for the performance of their duties. It is easy to understand, that independence must be one of those privileges, for otherwise, the safety of a minister would be precarious, and he might be annoyed and persecuted, and ill treated on a thousand pretexts. He is often charged with missions that

(*t*) Bynk. F. L. vii.

(*u*) Grot. ii. 18, iv.; Bynk. F. L. vii. and xvii.

(*v*) Grot. and Bynk. *ubi supra*.

(*w*) Grot. and Bynk. *ubi supra*.

are disagreeable to the prince to whom he is accredited; if the prince had any power over him, and especially sovereign authority, he could not be expected to obey the orders of his sovereign with the requisite fidelity, firmness, and freedom. It is essential that he should have no snares to apprehend; that he should not be distracted in the performance of his functions by any chicanery; that he should have nothing to fear from the sovereign to whom he is accredited. It is necessary, therefore, that he should be exempt from the civil and criminal jurisdiction of the state in which he is sent to reside (*x*). But no definite conclusion can be drawn from abstract reasoning upon this subject, because the right is not to be ascertained by reason, but by the will of nations (*y*). The usage of nations must determine, whether a delinquent ambassador is protected by the law of nations; and whether this protection extends to every kind of offence. The usage is to be collected from precedents, of which there is such abundance, that they furnish the means of settling the question without difficulty (*z*). In the time of Grotius the precedents were so conflicting, that in his opinion no inference could be drawn from them (*a*). But in this, as in other matters, the authority of Grotius has had great influence in settling the law. Huber observes, that the privilege of ambassadors had been much controverted, but at length the authority of Grotius prevailed (*b*). The same remark is made by Blackstone. The custom of nations established by their will, which subjects to the jurisdiction of a state every one who is found within its territory; provides an exception in the case of ambassadors, who by one fiction are taken for the persons of those whom they represent; and by

(*x*) Vatt. iv. § 92.

(*y*) Grot. ii. 18, iv. 2.

(*z*) Bynk. F. L. xvii. p. 172.

(*a*) Grot. ii. 18, iv. 2.

(*b*) Apud Bynk. F. L. viii. p. 158; Bla. Comm. i. 253.



another fiction are taken not to be within the territory of the state in which they are sent to reside, and consequently not to be subject to its laws (c). The privilege of ambassadors, says Bynkershoek, is to be referred to the voluntary law of nations (d). By the unanimous consent of nations, an ambassador is deemed not to be subject to the sovereign to whom he is accredited. This is the foundation of the privilege of an ambassador, which obtains only in the country to which he is accredited; for other states are not within the reason of the rule (e).

This privilege may be considered with respect: first, to civil liabilities; secondly, to offences; thirdly, to the time during which, and the persons to whom it attaches.

First, with respect to the civil privilege of an ambassador, it is necessary to state the rules of the Roman law *de legatis*; because they have been misunderstood, and this misunderstanding has led to most of the erroneous proceedings, that have occurred in the case of ambassadors. A *legatus* was exempt from the jurisdiction of the tribunals at Rome as to all actions *ex contractu* arising out of liabilities incurred before his appointment: and as to all actions *ex delicto* and criminal proceedings for wrongs done or offences committed before the same period. The reason of the rule was, that he might not be disturbed in the performance of his duties, and that the business of the legation might not be impeded. For the same reason, and also because he was not liable to be sued, he could not maintain an action *ex contractu* in those tribunals during the continuance of his office. But for contracts made,

(c) Grot. ii. 18, iv. 5. *Quare omnino ita censeo, placuisse gentibus; ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjecit, exceptionem pateretur in legatis: ut qui, sicut fictione quadam habentur pro personis mittentium, ita etiam fictione simili constituerentur quasi extra territorium. Unde et civili jure populi apud quem vivunt non tenentur.*

(d) Bynk. F. L. xxiv. p. 183.

(e) Grot. ii. 18, v.; Wicq. i. 396, 808, 914, 915; Bynk. F. L. ix.

or for wrongs done, or for offences committed during the continuance of his office, he was not privileged: as to the former, that he might not carry off the property of his creditors without paying for it; as to the latter, because his privilege was forfeited by his own wrong, according to the *maxim omnem dignitatem reatus excludit*. But there is no analogy between the *legati* here spoken of, and modern ambassadors. These *legati* were mere delegates sent by subjects to their sovereign. They were mere provincial and municipal deputies (*f*). Bynkershoek expresses his surprise, that after this distinction had been pointed out by Cujacius and Mornacius, and many others, these maxims should have been misapplied by the five eminent lawyers who were consulted by Queen Elizabeth in the Bishop of Rosse's case (*g*). It is more surprising that the Judges of the Provincial Court of Holland, the countrymen of Grotius, should have been ignorant of this distinction, when it had been particularly noticed by him. But if the civil law had expressly applied these rules to foreign ambassadors, they would not therefore have constituted the law of nations. If a different rule has been established by the usage of nations, that is the rule by which these questions must be determined. It is a great mistake to apply the maxims of the civil law to foreign ambassadors, whose rights must be ascertained by the tacit consent of nations (*h*). Grotius lays down the rule, that the personal property of an ambassador cannot be seized as security, nor taken in execution by judicial process, nor, as some have supposed, by the prerogative of the Crown, for any debts by him contracted; for an ambassador should be exempt from

(*f*) Grot. ii. 18, x.; Bynk. F. L. vi.; Mornacius, ff. v. i. § 3; *Legatis in eo quod ante, &c.*; Zouch de leg. del. Jud. 139; Wicq. i. 818, 821, 838.

(*g*) Bynk. F. L. vi. Answer to first question, Cam. El. an. 1571; Wicq. i. 819, 821.

(*h*) Bynk. *ibid.* and vii. p. 157.

all constraint that he may have entire security. If, therefore, he be in debt, and have no real property, his creditor ought to apply to him amicably, and if he refuse payment, resort must be had to his sovereign, or to such means as are used against debtors out of the realm (*i*). By these words, says Bynkershoek, Grotius clearly expresses the exemption of an ambassador from civil jurisdiction; and, he adds, in truth I may venture to say, that in civil matters, as to giving evidence and actions of debt, and other liabilities of the like nature, there is no country in Europe, at least none that I know of, wherein an ambassador is held liable to the ordinary jurisdiction of its tribunals (*j*). The decisions of the Judges of the Provincial Court of Holland in the seventeenth century were often erroneous; and when their proceedings rendered it necessary for the States General, after the promulgation of their declaratory decree, to interfere to protect the rights of ambassadors: it is difficult to impute to the prejudices of the accuser the charge of incorrigible ignorance, which Wicquefort continually brings against them (*k*). Bynkershoek himself mentions many instances of their illegal decisions. Amongst others, he states the case of the Portuguese ambassador, who was arrested and detained in prison till he had compromised with his creditors. Nothing could be more fraudulent than his conduct; for he had pledged, for the purpose of raising money, plate which he had bought on credit the day before. Yet, says Bynkershoek, the whole proceeding seems to me to have been contrary to law, notwithstanding the dishonesty of the ambassador (*l*). Of the same tribunal he observes in another place, that the law of the Court cannot be reconciled with the law of nations (*m*). In 1644, this Court replied to the inquiries of the States General respecting the Swedish ambassador, that the Court had jurisdiction over him in all

(*i*) Grot. ii. 18, ix.

(*l*) Bynk. F. L. xiii.

(*j*) Bynk. F. L. viii.

(*m*) Bynk. F. L. xv.

(*k*) Vid. Bynk. F. L. vii.

matters not concerning his office, to any extent short of subjecting him to personal constraint, or depriving him of the means of subsistence. The same Court allowed an action against the Spanish ambassador on a contract for the lease of a house. In 1651, the States General having signified to the Danish ambassador that they would no longer consider him as an ambassador; his creditors applied to the Court for an order to arrest him. In this case, however, the Court consulted the States of Holland, and being informed that the decree had reference to pending negotiations, and not to the public character of the ambassador, they refused the order (*n*). In 1679, the Court, in accordance with their principles of international law, seized the furniture and effects of the Danish ambassador. Thereupon the States General published a decree, wherein they declared; that foreign ministers and their attendants, and goods, are not liable during their residence, nor on their way thither or thence, to be arrested or taken in execution for any debt contracted in the United Provinces. This edict is declaratory of the law of nations, and must be construed with reference to the occasion of its promulgation. It only expresses debts contracted during residence, but it was not intended to imply liability for debts contracted elsewhere; and those to whom it was addressed never supposed ambassadors to be liable for debts contracted previously (*o*). In 1688, the secretary of legation of the Venetian embassy was arrested by process of the same Court for an alleged breach of contract. But neither in this matter, says Bynkershoek, should I be willing to admit the authority of the Court (*p*). Bynkershoek professes not to understand what Grotius means by saying, that if an ambassador refuse payment, resort must be had to his sovereign, or to such means as are used against debtors out of the realm. But his meaning

(*n*) Wicq. i. 856; Bynk. F. L. vii.

(*o*) Bynk. F. L. ix.

(*p*) Bynk. F. L. xix.

seems distinctly expressed, that if, on petition, a sovereign will not compel his ambassador to satisfy his creditors, their remedy is by suit in the Courts of his own country, or by action in rem, where he possesses property not privileged, and the law allows that form of proceeding. Thus Bynkershoek himself explains the words of Grotius (*q*).

In France, it appears, that the immunity of ambassadors was settled as early as the time of Henry 4; whom Bynkershoek characterizes as most learned in the law of nations and most tenacious of its rules (*r*). This text, says Mornacius, in his comment on the first title of the fifth book of the Pandects, and the title *De legatis*, are to be understood of municipal delegates, who are commonly called deputies. But ambassadors accredited by foreign powers are protected by the law of nations to that degree, that they are not compelled to submit to civil or criminal jurisdiction in their own persons or in the persons of their attendants; and this privilege they always maintain in the highest language and with the greatest energy. An example occurred in the case of the Venetian ambassador, whose goods were seized and an action brought against him by his landlord, for leaving his house clandestinely without paying his quarter's rent. The ambassador complained to the King, who treated the matter with unusual severity; determined the question that was raised respecting the customs of France, to the entire satisfaction of the ambassador; and commanded every thing to be done that could be devised to uphold his dignity (*s*).

In the time of Louis 14, some horses of the Venetian ambassador, in the care of servants wearing his livery, were seized for his debts. The civil lieutenant had authorized the proceeding, on the ground that the ambassador had taken leave of the court and that his successor had arrived. The

(*q*) Bynk. F. L. ix. x. xvi.

(*r*) Bynk. F. L. xix.

(*s*) Mornacius in ff. v. tit. i. § 3.

King, on the complaint of the ambassador and his successor, ordered the officers who had been concerned in the seizure to be imprisoned for their insolence, and the civil lieutenant to be severely reprimanded, for having summoned the ambassador without any previous notice. He further ordered the civil lieutenant to signify to his officers, that they were forbidden to summon foreign ministers for debt; to expunge from his register the order which he made for a summons to issue; and to make a personal apology to the ambassador (t). Yet in 1772, during the reign of a prince of a different character, the court of Versailles refused passports to the Baron de Wreck, ambassador of Hesse Cassel, and permitted his creditors to seize his furniture in satisfaction of his debts. The memorial circulated amongst the diplomatic body in vindication of this act, is more reprehensible than the act itself. Its author has the effrontery to state, that the privilege of ambassadors does not extend to their goods, and to cite Grotius, Wicquefort, and Bynkershoek in support of this statement; and to assert, that in England there is no law to ascertain the privileges of ambassadors, though the declaratory act of Queen Anne was passed in 1709 (u).

Vattel observes, that such exceptions only serve to prove the rule by the reprobation which they have encountered. In England, the common law recognizes the rights of ambassadors in their full extent, by immediately stopping all legal process sued out through the ignorance or rashness of individuals, which may entrench on the immunities of a

(t) *Flass. Dip. Fran.* iv. 42.

(u) *Flass. Dip. Fran.* vii. 92. The author of this memorial was Pfeffel, the legal adviser of the foreign department. It is probable that he was employed to justify an act which he had not advised. For no lawyer could have advised an act so outrageously illegal; and the style, in which he defends the worse, shews that he well knew the better reason. He was afterwards employed to justify, on the ground of an original defect of title, the seizure of Avignon by Louis 15, after it had been in the possession of the holy see for more than four centuries.

foreign minister, or any of his train. In respect to civil suits all the foreign jurists agree, that neither an ambassador, nor any of his train or comites, can be prosecuted for any debt or contract in the Courts of that kingdom wherein he is sent to reside. Yet Sir Edward Coke maintains, that if an ambassador make a contract, which is good *jure gentium*, he shall answer for it here. But the truth is, so few cases (if any) had arisen wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law books are in general quite silent upon it previous to the reign of Queen Anne; when an ambassador from Peter the Great was actually arrested and taken out of his coach in London for a debt of fifty pounds, which he had there contracted. Instead of applying to be discharged on his privilege, he gave bail to the action, and next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same time sworn a member), and seventeen were committed to prison, most of whom were prosecuted by information in the Court of Queen's Bench at the suit of the Attorney General, and at the trial before the Lord Chief Justice were convicted of the facts by the jury; reserving the question of law, how far those facts were criminal, to be afterwards argued before the Judges: which question was never determined. In the mean time the Czar resented this affront very highly, and demanded that the Sheriff of Middlesex and all others concerned in the arrest should be punished with instant death. But the Queen, to the amazement of that despotic court, directed her secretary to inform him, that she could inflict no punishment on any the meanest of her subjects, unless warranted by the law of the land; and, therefore, was persuaded that he would not insist upon impossibilities. To satisfy, however, the clamour of the foreign ministers, who made it a common cause, as well as to appease the wrath of Peter, a bill was brought into Parliament and afterwards passed into a

law, to prevent and punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, an ambassador extraordinary was commissioned to appear at Moscow, who declared that although her Majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of the kingdom, yet with the unanimous consent of her Parliament, she had caused a new act to be passed to serve as a law for the future. This humiliating step was accepted by the Czar as a full satisfaction, and the offenders, at his request, were discharged from further prosecution. This statute recites the arrest that had been made in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable: wherefore it enacts, that for the future, all process, whereby the person of any ambassador, or his domestic, or domestic servant, may be arrested or his goods distrained or seized, shall be utterly null and void: and that all persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose: and shall suffer such penalties and corporal punishment as the Lord Chancellor and the two Chief Justices or any two of them shall think fit. Thus, in cases of extraordinary outrage, which the law hath provided no special penalty, the Legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime. But it is expressly provided by the act, that no trader within the description of the bankrupt laws, who shall be in the service of an ambassador, shall be privileged or protected by this act: nor shall any one be punished for arresting an ambassador's servant, unless his name shall be registered with the Secretary of State, and by him transmitted to the sheriffs of



London and Middlesex. Exceptions, that are strictly conformable to the rights of ambassadors as observed in the most civilized countries (*v*). Though ambassadors only are mentioned in the body of the act, it extends to all public ministers, who are equally within the reason of the statute, as recited in the preamble thereof. The declaration of the court of Holland in 1644 and 1659, that ambassadors only are entitled to the protection of the law of nations, has no foundation in reason or authority. No one but that court ever doubted that envoys and residents are on the same footing as ambassadors in respect of privilege. The act of Queen Anne was not occasioned by any doubt as to the privileges of ambassadors; but by the consideration, that the arrest therein recited was, by the law of England, only a misdemeanor and not liable to any special punishment: any sentence that the Court of Queen's Bench could have passed on those convicted of the offence would have been regarded by Peter the Great as a fresh insult (*w*). The act is merely declaratory of the law of nations, as part of the common law of England (*x*). Nor was it intended to vary one iota of those privileges, which being established by the law of nations, cannot be altered by any municipal law (*y*). Long before the passing of this act in the year 1657, the minister of the Elector of Brandenburg was arrested in London for debt, but he was immediately discharged, and all who were concerned in arresting him were committed to prison (*z*). The same considerations have induced other states to provide

(*v*) Bla. Comm. i. 253—iv. 70.

(*w*) 3 Burr. 1480; 4 Burr. 2016.

(*x*) Per Lord Talbot, *Barbuit's case*, C. T. Talbot, 281; per Lord Mansfield, *Triquet v. Bath*, 3 Burr. 1480; *Lockwood v. Coysgarne*, 3 Burr. 1678; *Heathfield v. Chilton*, 4 Burr. 2016; Per Lord Ellenborough, *Viveash v. Baker*, 3 M. & S. 292; per Lord Tenterden, *Novello v. Tuogood*, 1 B. & C. 562; 2 Bla. Comm. i. 253.

(*y*) Per Lord Mansfield, *Heathfield v. Chilton*, 4 Burr. 2016; *Triquet v. Bath*, 3 Burr. 1480.—cf. Grot. iii. 9, xvii.

(*z*) Bynk. F. L. xiii.

special remedies for similar outrages. The states of Holland in the year 1651, passed a law which, after reciting the sacred and inviolable character of ambassadors, provides that if any person shall injure or violate the sacredness of any ambassador or any of his train, or his house, equipages or goods, he shall be deemed a violator of the law of nations and a disturber of the public repose, and as such shall suffer corporal punishment (*a*). This law seems not to have been overlooked by those who framed the statute of Anne.

But the Dutch law had before provided special penalties for any outrage committed against an ambassador. In 1647, the house of the Russian ambassador was attacked and his windows were broken. The states of Holland published an edict by which it was provided, that any person attacking the house of the ambassador, by day or by night, should be liable to corporal punishment and pecuniary penalties, and any person hooting or otherwise insulting any of his train should be liable to a discretionary punishment (*b*). So by the law of the United States, it is provided, that persons offering violence to ambassadors or other public ministers, or being concerned in prosecuting or arresting them, shall be liable to be imprisoned for any term not exceeding two years and to be fined at the discretion of the Court (*c*). This act obviously proceeds on the idea of prescribing the punishment for an act previously unlawful; not of granting to a public minister a privilege, which he would not otherwise possess (*d*). But this privilege extends not to real property possessed by an ambassador in his private capacity in the country to which he is accredited (*e*); nor does it extend to stock in trade (*f*). Wicque-

(*a*) Wicq. i. 809; Bynk. F. L. v.

(*b*) Bynk. F. L. v.

(*c*) Kent Comm. i. 170.

(*d*) Per Marshall, C. J., *Schooner Exchange*, 7 Cranch, 138.

(*e*) Grot. ii. 18, ix.; Bynk. F. L. xvi.; Vatt. iv. 113, *et seq.*

(*f*) Bynk. F. L. xvi. *et* xv. sub fine; Bla. Comm. i. 253; Vatt. iv. 113, *et seq.*

fort suggests, that the privilege does not extend to a debt, acknowledged by an ambassador before a notary public (*g*). The distinction is manifestly absurd, for if an ambassador be privileged as to all debts as he undoubtedly is, it is plainly immaterial by what evidence the debt is to be proved. If he were liable for such a debt, still more must he be liable for debts acknowledged by deed. Bynkershoek imputes this groundless distinction to Wicquefort's ignorance of private law (*h*). Wicquefort seems to have inferred a waiver of privilege from such acknowledgment; but he immediately corrects his own inference by the remark, that the privilege of an ambassador is the privilege of his sovereign, and cannot be waived without his consent (*i*). A debt so acknowledged is no less within the privilege, than any other contract.

Secondly, As to the exemption of ambassadors and their train from criminal jurisdiction. The principle of this exemption is clearly established by Grotius and Bynkershoek. The immunity of ambassadors, says Grotius, is a difficult question, and has been variously determined by eminent writers of the present age. Some think that they are exempt only from unjust violence, and that privileges are to be construed according to common right. Others think that their exemption extends to all offences but such as are violations of the law of nations; but this is a large exception, for the law of nations includes the law of nature (*j*), so that on this principle an ambassador would be punishable for all offences but such as are of mere municipal institution. Others restrain the exception to cases of treason. Others think it dangerous to allow jurisdiction over an ambassador in any case, and that justice should be demanded of the sovereign by whom he is accredited.

(*g*) Wicq. i. 899.

(*h*) Bynk. F. L. xvi.

(*i*) Wicq. i. 899; Bynk. F. L. xxiii.

(*j*) This is inaccurate: but the inaccuracy does not affect the argument; for Grotius correctly refers the question to the usage of nations.

The arguments adduced in support of each opinion lead to no certain conclusion; for this law is not like the law of nature to be deduced from mere reason, but is a matter determinable by the will of nations. But they may have given either an entire or a limited immunity to ambassadors; for on the one side is to be considered the importance of punishing great offenders; and on the other, the importance of embassies, the purposes of which are best promoted by entire security. The question to be considered, therefore, is, how far the usage of nations is settled. According to natural justice and equity, that is, according to the mere law of nature, an offender may be punished wherever he is found; but the law of nations excepts ambassadors, and those who come under the protection of the public faith. Therefore the prosecution of ambassadors is prohibited by the law of nations, whereby many things are forbidden, which the law of nature allows. The better opinion is, that privileges must be construed to confer something beyond common right; for if ambassadors were only protected against unjust violence, they would enjoy no distinction or privilege at all. Besides, the security of ambassadors is more important than the punishment of particular offences. The safety of ambassadors would be placed on a very unsteady footing, if they were responsible to any one but the sovereign by whom they are sent; for, since the interests of those who send ambassadors, and of those who receive them, are generally different and often adverse, there never would be any difficulty in finding something to impute to an ambassador that would bear the semblance of an offence; and although some offences be too clear to admit of doubt, the general peril is a sufficient justification of the general rule (*h*).

Therefore, if an offence be such as may be overlooked without danger, it may be passed over without notice, or the ambassador may be required to leave the country. If an

(*h*) Cf. Wicq. 808, 825; Vatt. iv. 98.

ambassador commit a crime of more serious character, and which endangers the public safety, he may be sent home, and his sovereign may be required to do justice upon him. In case of extreme necessity, and to provide against imminent peril, he may be arrested and examined (1). The offences that may be committed by ambassadors, says Bynkershoek, are either common offences or such as affect the safety of the state. In regard to both classes, if reason only be consulted, much may be alleged for and against the privileges of ambassadors. Grotius examines the arguments on both sides, and justly rejects the opinion, that ambassadors are only to be protected against unjust violence; for on that principle they would have no privilege, as private persons are entitled to the same protection. Others restrict the privilege to such offences as are not contrary to the law of nations, in which case ambassadors would be punishable for all offences but such as are created by municipal law. Others, to whom this restriction seems too harsh, extend the privilege to all offences short of treason. Grotius himself weighs the importance of punishing crimes against the importance of giving security to ambassadors, and justly concludes that the preponderance must be ascertained by the will of nations. To the usage of nations, therefore, the appeal must be made, where the question is, whether a delinquent ambassador is protected by the law of nations in one class of offences, or in all. This usage is to be collected from precedents, of which there is such an abundance, that the examination of them will remove all difficulty in the determination of this question.

Looking only to precedents to determine what is the usage, and consequently what is the law of nations, they seem to me to prove that an ambassador cannot be prosecuted or punished for any offence in the country wherein he is sent to reside, but

(1) Grot. ii. 18, iv.

that a sovereign against whom an offence is committed ought to follow those rules which Grotius has prescribed; except that even in offences of the greatest malignity, I should hold the expulsion of an ambassador to be sufficient. The principal reason that determined the opinion of Grotius, determines mine, namely, that by the unanimous consent of nations, an ambassador is deemed not to be subject to the sovereign to whom he is accredited (*m*). After citing many precedents, and referring to those collected by Wicquefort, he concludes with these words:—Examine the precedents collected by Wicquefort, compare them with those which I have produced, and you will find it impossible to doubt, that by the conventional law of nations, founded upon their tacit agreement, ambassadors, however deserving of punishment they may be, can be punished only by those whose ambassadors they are, and cannot be punished by those to whom they are accredited (*n*).

It will be convenient first to collect the cases in which the law of nations has been violated, omitting those that are gathered from ancient history, which are altogether impertinent, where the custom, not of ancient, but of modern nations, is to be determined. A comparison of these precedents with those in which the law has prevailed, will fully bear out the opinion of Bynkershoek.

Pope Julius 2 imprisoned the ambassador of the Duke of Savoy, and caused him to be put to the question as a spy (*o*).

Pope Paul 4 imprisoned Garcilasso de la Vega, the Spanish ambassador, for conspiring against his government; and replied to the remonstrances of the Duke of Alva, that if the ambassador had not exceeded his functions he would not have been molested; but that when he made himself an accomplice of treasonable conspiracies, he must be deemed to have acted in

(*m*) Bynk. F. L. xvii.—cf. Wicq. i. 808, 822, 825.

(*n*) Bynk. F. L. xviii.

(*o*) Wicq. i. 846.

his private capacity, and to be liable to punishment. The matter went no further, and he was discharged. But the King of Spain resented the outrage, and exacted satisfaction for it (*p*).

Marville, the French minister at Milan, was executed for murder; but it is at least doubtful whether he was entitled to privilege, as he seems to have been a secret agent, and not an accredited minister (*q*).

An ambassador in Portugal and the Venetian ambassador at Milan, were put to death for adultery (*r*). A domestic servant of the French ambassador in Rome, was put to death for having broken the chain of the galley slaves to rescue a prisoner (*s*).

The King of Spain caused some of the Venetian ambassador's domestics, who had been guilty of a grave offence, to be seized in the house of the ambassador. They were tried and condemned to death, but afterwards pardoned and ordered to quit the kingdom. The King of Spain is said on that occasion to have sent a circular letter to all the courts to declare, that if his ambassadors committed any offence, he was willing that they should be tried by the laws of the country in which they were sent to reside. But the opinion of a single sovereign does not constitute the law of nations. Besides, Spanish ambassadors have been dismissed by many sovereigns, who would have punished them if the King of Spain had given such a permission, or it had been the Spanish practice to punish ambassadors (*t*).

In 1601, some of the train of the French ambassador at Valladolid having been arrested for having killed two Spaniards, the King of Spain with difficulty escaped a war with France, through the intercession of the Pope; to whom

(*p*) Wicq. i. 847; Bynk. F. L. xviii.; Flass. Dip. Fran. i. 364.

(*q*) Wicq. i. 115, 275; Bynk. F. L. xviii.; Flass. Dip. Fran.

(*r*) Bynk. F. L. xviii.

(*s*) Wicq. i. 394.

(*t*) Bynk. F. L. xix.

the prisoners were given up, and by him delivered to the French ambassador in Rome (*u*).

Pantaleon da Sa, the brother of the Portuguese ambassador, and probably one of his train, committed a deliberate murder in the London Exchange. Cromwell caused him to be seized in the ambassador's house, and he was tried, condemned, and executed (*v*). On his trial he produced letters designating him his brother's successor, and claimed the privilege of an ambassador. The Judges appear to have held, that he submitted to the jurisdiction by pleading (*w*); an opinion which he justly impugned, on the ground that he was threatened with *peine forte et dure*, if he persisted in his refusal to plead; and which may also be controverted, on the ground that the privilege of an ambassador is the privilege of his sovereign, and cannot be waived without his consent (*x*). The lawyers, who were consulted by Cromwell, were unable to agree on the law of the case. From the account given by Zouch, who was one of them (*y*); it is impossible to discover, whether Cromwell proceeded on motives of popularity; or upon a military contempt for law; or upon the notion, that the privilege of an ambassador is merely personal, and does not extend to his train; or upon the groundless distinction set up by English lawyers, that the privilege attaches only to offences that are *mala prohibita*, and not to such as are *mala in se*. The justification of the act seems to have been based on the supposed municipal constitutions of England; but according to Thurloe's account, the execution was altogether politic (*z*). Cromwell is not to

(*u*) Wicq. i. 883; Flass. ii. 210.

(*v*) Wicq. i. 885.

(*w*) Thurloe's State Papers ii. 429.

(*x*) Bynk. F. L. xxiii.; Wicq. i. 910; Vatt. iv. § 3; per Lord Talbot, *Barbuit's case*, C. T. Talbot, 281; per Lord Ellenborough, *Viveash v. Becker*, 3 M. & S. 284.

(*y*) De Leg. del. Jud.

(*z*) Thurloe, ii. 428, 447.



be blamed, says Bynkershoek, as some have blamed him, for having seized a criminal in the house of an ambassador; but for having seized one of an ambassador's train, over whom, as not being his subject he had no jurisdiction (*a*). Wicquefort, being resident of the Duke of Lunebourg, in Holland, and at the same time secretary to the States General in their secret department, was condemned to perpetual imprisonment and the forfeiture of his goods, for having sold secrets of state (*b*). The minister of the Bishop of Munster, in 1680, was imprisoned on a charge of having bribed the sworn secretary of the States General to betray secrets of state; but on the demand of the bishop he was set at liberty (*c*).

Some of these precedents are capable of being distinguished; but, admitting them all to be pertinent, they will bear no comparison, either in number or weight, with those that may be brought forward on the other side. The latter, therefore, ought to prevail, and have prevailed, even with those who, on other occasions, have been hurried by the impulse of passion to punish ambassadors (*d*).

The Marquis of Mirabel, the Spanish ambassador in Paris, being implicated in a plot against Cardinal Richelieu, for which several persons were executed, was only required to return to Spain without delay (*e*).

Balthazar de Luniga, the Spanish ambassador, was detected in a plot with Jean de Merargues to procure the town of Marseilles to be betrayed to the King of Spain. Merargues was watched and discovered in communication with the ambassador's secretary, and they were both arrested. The ambassador protested against the imprisonment of his secretary, but Henry 4 replied, that the law of nations does not forbid the arrest of a minister as a measure of self defence. After consulting the most learned lawyers in Paris, the King,

(*a*) Bynk. F. L. xxi.

(*b*) Bynk. F. L. xi. xviii.

(*c*) Bynk. F. L. xiv.

(*d*) Bynk. F. L. xviii.

(*e*) Wicq. i. 342.

by their advice, released the secretary, on condition that he should be sent home immediately (*f*). The Senate of Venice having discovered that the Spanish ambassador was implicated in a conspiracy to set fire to the town, and admit Spanish troops during the confusion, contented themselves with writing to the King of Spain to demand his recall (*g*). In 1563, Queen Elizabeth requested Philip 2 to recall Alvarez de Quadra, the Spanish ambassador, who was implicated in dangerous cabals against her government. The King replied, that he could not gratify the Queen in that matter; that the condition of princes would be pitiable if they were obliged to recall their ministers for not conforming to the humour or interests of those with whom they were sent to negotiate. Thereupon the Queen set a guard over the ambassador, and caused him to be examined before the Privy Council (*h*). On similar grounds, in 1677, Charles 2 ordered Barnardo de Salinas to quit the kingdom in twenty days (*i*). In 1571, the Bishop of Rosse, ambassador of Mary Queen of Scots, then a prisoner in England, was the soul of all the conspiracies formed against Queen Elizabeth, and was in correspondence with the rebels, who had taken refuge in the Low Countries, and with the Duke of Alva, the King of Spain, and the Pope, for the purpose of procuring the invasion of England. The facts were clearly proved, and five lawyers, who were consulted by Queen Elizabeth, gave an opinion that an ambassador forfeits his privilege by conspiring against the sovereign to whom he is accredited. Yet, the Queen's ministers distrusting this opinion which was altogether erroneous and founded on a misconception of the civil law (*j*), he was not brought to

(*f*) Wicq. i. 828; Bynk. F. L. xix.

(*g*) Wicq. i. 828.

(*h*) Wicq. i. 910.

(*i*) Wicq. i. 912.

(*j*) Mornacius ff. v. i. § 3; Grot. ii. 8, x.; Wicq. i. 821; Bynk. F. L. vi.; Zouch de leg. del. Jud. 104, 139.

trial, but sent out of the country after he had been imprisoned for two years (*k*). Nor was it afterwards acted upon in the case of Mendoza, the Spanish ambassador, who was detected in similar practices. In that case, Hotman and Albericus Gentilis were consulted, and the former recommended that the matter should be referred to the King of Spain. But the Queen's government acted upon the opinion of the latter, who advised that he should be sent out of the kingdom (*l*). When L'Aubespine, the French ambassador, had conspired against the life of Queen Elizabeth, and refused to hear any charge brought against himself to the prejudice of his public character and the dignity of his sovereign: he was dismissed with a slight reprimand (*m*). Shortly after the apprehension of the domestics of the French ambassador at Valladolid, two Spaniards were killed by some of the train of the Venetian ambassador in Madrid. The King would not allow them to be apprehended (*n*). In 1606, Cantreiroix, the imperial ambassador at Venice, was guilty of coining, of murder, and of an attempt to assassinate his wife. The Senate complained to the Emperor, and procured his recall (*o*). In 1614, Colonel Alard was sent on a mission from the Duke of Savoy to Marshal Lesdiguières, governor of Dauphinè, to demand assistance against the Spaniards. While he was waiting at Grenoble for the King's answer to his application, he was imprisoned for murder. The governor went to the prison and commanded that he should be released. The Parliament remonstrated, but the governor replied that he was bound to repair the error they had committed in apprehending the minister of the duke in violation of the law of nations. His conduct was approved by Louis 13 in a special ordinance,

(*k*) Wicq. i. 818.

(*l*) Wicq. i. 824; Zouch de leg. del. Jud. 104.

(*m*) Wicq. ii. 19; Bynk. F. L. xviii.; Flass. ii. 116.

(*n*) Wicq. i. 885; Bynk. F. L. xx.

(*o*) Wicq. i. ii.

which was registered by the Parliament in the following year (*p*). Miqueli, the Venetian ambassador at Turin, refused to surrender his page, who had drawn his sword in the ante-chamber of the duke against one of the royal family (*q*). When an Englishman was killed by one of the domestics of the French ambassador extraordinary sent to congratulate James I on his accession, the English Courts took no cognizance of the offence (*r*). The Spanish ambassadors, the Marquis of Inoyoya and Don Carlos Coloma, presented libellous memorials to James I, charging the Prince of Wales and the Duke of Buckingham with treasonable designs. The King took no proceedings against them, but complained of their conduct to the King of Spain (*s*). In 1618, Le Clerc, the French chargé d'affaires, was accused of a design to favour the escape of Sir Walter Raleigh, then imprisoned on a charge of treason. He refused to submit to be examined before the Privy Council, but consented to speak of the matter privately; and being confronted with his agent, admitted the fact. The King forbade him the Court, and he was obliged to return to France (*t*). In 1651, the Spanish ambassador complained to the states that the French ambassador had intercepted his despatches and opened his letters: they refused to take any cognizance of the matter, as one which could only be inquired into by the Kings of France and Spain (*u*). In 1654, Le Bas, the French envoy, was implicated in a conspiracy against the life of Cromwell. He refused to be examined before the Privy Council, alleging, that as a public minister, he was responsible to none but his sovereign. The proofs were clear, and he was ordered to quit the kingdom in twenty-four

(*p*) Wicq. i. 273.

(*q*) Wicq. i. 888.

(*r*) Wicq. i. 887; Flass. ii. 218.

(*s*) Wicq. i. 341, 830—ii. 89.

(*t*) Wicq. i. 837.

(*u*) Bynk. F. L. vii.

hours (v). In 1657, one of the domestics of De Thou, the French ambassador at the Hague, was apprehended by the patrol at night in the act of doing violence to a woman in the street. He was given up to the ambassador who claimed him (w). In 1696, the acting *chargé d'affaires* of England and Holland in Madrid, in the absence of the English and Dutch ministers, presented insulting memorials to the King of Spain. For this offence he was ordered to quit Madrid, and, on his refusal, was put out of the town by military force. The King of England and the States General demanded instant satisfaction, and signified that if it were refused, they would immediately dismiss the Spanish ambassador. This demand, in the opinion of Bynkershoek, was not in accordance with the law of nations. But it does not appear whether the alleged offence was disputed or not. The difference was compromised by the King of Spain receiving the minister, who was immediately recalled by the King of England and the States General (x). In 1752, two of the domestic servants of Baron Griffenheim, the Swedish minister at the Prussian courts, were arrested in the house of the ambassador on a charge of offences against the excise laws. The Empress ordered those who were concerned in the outrage to be imprisoned, and ordered the head of the excise to be prosecuted before the Senate, and satisfaction to be made to the ambassador, and her displeasure and indignation at the act to be declared to all the foreign ministers in St. Petersburg (y). The practice of examining foreign ministers is not in accordance with the modern usage of nations, and is inconsistent with their irresponsible character. There are no legal means by which they can be compelled to answer. The attempt was

(v) Wicq. i. 836 ; Bynk. F. L. xix.

(w) Wicq. i. 885 ; Bynk. F. L. xx.

(x) Bynk. F. L. xix.

(y) Vatt. iv. § 117.

successfully resisted by Chalcameuf, Le Clerc and Le Bas in the times of Elizabeth, James I, and Cromwell.

With respect to the dismissal of ministers, it is usual where the matter admits of delay, first to demand his recall, as was done by Queen Elizabeth in the case of Alvarez de Quadra. But this is a mere act of courtesy, which cannot be expected on occasions of imminent peril (*z*). The dismissal of an ambassador on such occasions is not an assumption of jurisdiction, but a measure of self-defence, which no one has ever denied to be legal in the case of ambassadors (*a*). In 1716, Count Gyllenborg, the Swedish ambassador, at the court of St. James's was sent home in custody (*b*). If an ambassador use force he may be repelled by force; to kill an ambassador in self-defence would be no violation of the law of nations (*c*). At the siege of Hanoë, the King of Denmark finding that the Swedish ambassador was arming his train with intent to join the enemy, caused him to be arrested and disarmed (*d*). The law on this subject is summed up by Bynkershoek in these words:—Barbeyrac, in his notes to Puffendorff, lays down the law that a delinquent ambassador cannot be punished by the sovereign to whom he is accredited; and after stating the measures to be observed, he adds, when the danger is imminent, an ambassador may be seized as an open enemy; may be imprisoned—may be put to death, if it be indispensably necessary to our safety. I see no objection, says Bynkershoek, if the safety of the state cannot be otherwise assured: *salus populi, salus principis, suprema lex esto*. But generally speaking, milder measures are sufficient, unless an ambassador commit

(*z*) Bynk. F. L. xix.; Wicq. i. 340, 904, 909; Vatt. iv. § 95; Fost. C. L. 187.

(*a*) Bynk. F. L. xviii.

(*b*) Foster C. L. 187.

(*c*) Grot. ii. 18, iv. 7; Bynk. F. L. xvii.; Wicq. i. 890, 909, 918, 923; Vatt. iv. §§ 82, 97.

(*d*) Bynk. F. L. xviii. p. 173.

actual violence and be killed in a riot. The expulsion or custody of an ambassador is a sufficient precaution in all other cases. I do not deny that, where peril is imminent, an ambassador may have a guard set over him and be thus sent home, and justice demanded of his sovereign; whether the acts of the ambassador have been in accordance with his instructions or not. But I deny that he can, under any circumstances, be proceeded against in the ordinary course of justice and punished by the tribunals of the country in which he is sent to reside (*e*). As ambassadors represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws are made. But an ambassador ought to be independent of every power but that by which he is sent, and of consequence ought not to be subject to the laws of that nation wherein he is to exercise his functions. If he grossly offends or makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or to avow himself the accomplice of his crimes. But there is a great dispute amongst the writers of the law of nations; whether this exemption of ambassadors extends to all crimes as well natural as positive, or whether it only extends to such as are *mala prohibita*, as coining, and not those that are *mala in se*, as murder. Our law seems formerly to have taken in the restriction as well as the general exemption. For if it was held both by our common lawyers and civilians, that an ambassador is privileged by the law of nature and nations; and yet if he commits any offence against the law of reason and nature he shall lose his privilege: and that, therefore, if an ambassador conspires the death of the king, in

(*e*) Bynk. F. L. xxiv.; Vatt. iv. 99—110.

whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom. But however these principles might formerly obtain, the general practice of this country, as well as the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime. And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offence however atrocious in its nature (e).

Grotius raises a question whether a sovereign, whose ambassador has been injured, has a right to retaliate upon the ambassador of the sovereign who hath done the wrong. And he gives the following reason for denying the right. The law of nations provides not only for the dignity of the sovereign, but for the security of his ambassador, with whom there is an implied contract of indemnity; so that by retaliation an injury would be done to the ambassador, though no injury would be done to the prince who sent him (f). Bynkershoek casts a doubt upon the opinion of Grotius, but so expresses himself, as to shew that he is doubtful of the reasonableness of his own doubts.

He draws a distinction not easily understood between justice and the refinements of justice, and suggests, that in such cases it would not be unreasonable to refuse the ambassador his privileges. Justice, says Bynkershoek, is matter of right, but the refinements of justice are matter of favour. It would be unlawful to do violence to the ambassador of a sovereign, by whom an ambassador has been wronged; but perhaps it would be lawful to treat him as a subject, and to deny him the privileges of an ambassador, which are sanctioned

(e) Bla. Comm. i. 253; Wicq. i. 912.

(f) Grot. ii. 18, vii.



by the common usage of nations, and are to be considered as a refinement of justice. It seems to me that this course would be lawful, as it inflicts no injury upon the ambassador, but only upon his sovereign. Others are of a different opinion. The same is to be said of reprisals and of every other mode of retaliation. If immunity from reprisals is allowed to ecclesiastics and scholars and persons of other classes, the same immunity belongs to ambassadors, who are secure in the midst of war. To say that the privileges of ambassadors are not defined by international or municipal law, and carry with them no moral obligation, and are therefore only sanctioned by the power of the sovereign by whose ambassador they are claimed, is to lay down a principle subversive of the law of nations. The will of nations requires that those rules which, being sanctioned by reason, usage, and humanity, have been received in the practice of nations, should be observed as international law. By the reason of all ages, and the usage of all people, ambassadors are exempt from reprisals; but the same authority which sanctions the exemption sanctions an exception, where a sovereign withholds such exemption in vindication of injuries committed upon his ambassador (*g*). It is not clear how far Bynkershoek considers retaliation allowable. It seems to be his opinion, that ambassadors may be imprisoned by way of reprisals. But it is not easy to see how humanity can sanction the punishment of one man for the act of another, or how it is reconcileable with reason, that an ambassador should be imprisoned for an offence committed by his master, when he cannot lawfully be imprisoned for murder committed by himself. It is true, that objections founded on reason and humanity would be of no weight if the usage were clearly established. But Bynkershoek produces only two precedents to prove the usage. One of these he condemns as illegal (*h*). The other is the act of the States of

(*g*) Bynk. F. L. xxii.; Vatt. iv. 102.

(*h*) Bynk. F. L. xxii. p. 180.

Holland, who imprisoned the secretary of the English ambassador at the Hague, in retaliation for the imprisonment of the ambassador of the States General in London. This act was clearly irregular; for if the right to do it existed, it was vested in the States General, and could be exercised only by them (*i*). The authority of Grotius is opposed to that of Bynkershoek; and to this precedent furnished by the Dutch may be opposed that of a state remarkably observant of the law of nations. In 1570, Selim 2 sent an ambassador to Venice to demand the island of Cyprus, and to declare war if it was refused. The ambassador was under considerable apprehension for his own safety, because the Sultan had imprisoned the Venetian ambassador at Constantinople. But the Senate assured him that he had no occasion for alarm, that the republic never permitted its subjects to violate the law of nations by offering violence or insult to an ambassador, and that he should be sent back in safety by the way he came (*j*). Other sovereigns have shewn less forbearance. Francis 1 arrested the Spanish ambassador in retaliation for the arrest of the French ambassador by Charles 5 (*k*); and Elizabeth retaliated on the French ambassador, when Throgmorton and Smith were arrested by Charles 9 (*l*). But in the last instance the proceedings on both sides were lawful; for the English ambassadors had entered France during war without passports, and the French ambassador had continued in England after the commencement of hostilities for a longer period than was necessary for his convenient departure. Heineccius, however, adopts the opinion of Bynkershoek, and holds that the imprisonment of an ambassador is lawful by way of reprisals (*m*).

(*i*) Bynk. Q. J. P. i. xxiv.

(*j*) Wicq. i. 906.

(*k*) Vatt. iv. § 102; Flass. i. 354.

(*l*) Flass. ii. 73.

(*m*) Heinecc. Prælec. in Grot. ii. 18, vii.

The limits that are assigned to the operations of war against ambassadors are, that you may exercise your right of war against them wherever the character of hostility exists. You may stop the ambassador of your enemy on his passage; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested. It has been argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; but that is a fiction of law, invented for his further protection only, and as such a fiction it is not to be extended beyond the reasoning on which it depends. It is intended as a privilege, and cannot be urged to his disadvantage. He certainly could not on that principle be said to be subject to any of the rights of war in a neutral territory; he is there for the purpose of carrying on the relations of peace and amity for the interests of his own country primarily, but at the same time for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations (*n*).

Thirdly, The privilege is to be considered with regard to the time during which, and the persons to whom it attaches. It attaches to an ambassador *eundo morando et redeundo* (*o*). Hence if an ambassador be recalled and leave any part of his train behind him to settle his affairs, their privilege continues for such reasonable time as is necessary for that purpose. On this ground Bynkershoek condemns the seizure of the property of the wife of the English ambassador at the Hague, who had remained for that purpose only after her husband's departure (*p*).

(*n*) The *Caroline*, 6 Rob. 461.

(*o*) Bynk. F. L. ix.; Wicq. i. 856, 945; Vatt. iv. §§ 83, 125, 126.

(*p*) Bynk. F. L. xiv.

In 1661, the French ambassador's chaplain, who had remained in Holland after the ambassador's return to France, was imprisoned for performing mass; but he was discharged on the demand of the ambassador, as it seems, on this ground (*q*). In the case of the Venetian ambassador before cited, whose goods were seized by his creditors, and restored by order of Louis 14, his functions had ceased by the reception of his successor (*r*).

The functions of an ambassador cease by the death of either of the sovereigns by or to whom he is accredited (*s*). Yet, on the assassination of Henry 3, the Senate of Venice, out of consideration for Henry 4, intimated to the French ambassador that they would continue to recognize him as ambassador of France until new credentials had been delivered to them (*t*). But the privilege of an ambassador is not suspended while he is expecting new credentials, or waiting to be recalled (*u*). The functions of an ordinary ambassador are determined by a declaration of war; but he cannot be treated as an enemy, and can only be required to leave the country, though his sovereign be the aggressor, or war be declared by him (*v*).

Secondly, The privilege of an ambassador extends to all his train or comites (*w*). The words of the statute of Anne, domestic or domestic servants, are put only by way of example. It is not essential to the privilege, that the servant should lodge in the house of the ambassador; for his house may not

(*q*) Bynk. F. L. xv.

(*r*) Flass. iv. 42.

(*s*) Wicq. i. 929.

(*t*) Wicq. i. 930.

(*u*) Vatt. iv. § 125, 126.

(*v*) Wicq. i. 939, 940; Bynk. F. L. xxii.

(*w*) Vatt. iv. 120, *et seq.*; Bynk. F. L. xv. Ex consuetudine, quæ nunc vicit inter gentes, viri legati domum revocant tam in contractibus, quam in delictis. Igitur in utrisque etiam domum revocabunt, comites sive majores sive minores: nam et lixæ, scoparii, stabularii sequuntur forum legati.

be large enough to contain all his servants (x). Couriers employed in conveying ambassadors' despatches are privileged (y). Secretaries, though neither domestics nor menial servants, are privileged (z). The case of *English v. Caballero* (a), is probably ill reported. In that case, although it appeared that the secretary of an ambassador was in daily attendance upon him, before and at the time of the arrest, and employed in copying despatches and other official documents; the reporter makes the refusal of privilege to depend upon the circumstance, that it was not proved that the secretary was a domestic servant of the ambassador or employed in his house. Neither of these circumstances appeared in *Evans v. Higgs* or in *Hopkins v. De Robeck*. In *Evans v. Higgs*, the defendant was English secretary to an ambassador, and the Court observed, that the nature of his employment required his attendance at the ambassador's house. In *Hopkins v. De Robeck*, the Court held, that it is sufficient, if it appears that the defendant is really attached as secretary to the embassy; for it would be impossible to carry on state negotiations, if persons in his situation were not protected. Neither of the reasons stated in the report is necessary to support the judgment in *English v. Caballero*, for the privilege was not claimed for the secretary but for his wife; and such privilege does not seem to be necessary for the convenience of the ambassador, for his secretary might still perform his functions, though his wife was in prison. But to entitle the servant to privilege, he must be in the service of the ambassador when the privilege is claimed, for the process of law shall not take a person out of the service of a public minister; but on the

(x) *Widmore v. Alvarez*, Fitzgib. 200; *Triquet v. Bath*, 3 Burr. 1478; *Hopkins v. De Robeck*, 3 T. R. 88; *Lockwood v. Coysgarne*, (per cur.), 3 Burr. 1676; per cur. *Darling v. Atkins*, 3 Wilson, 35.

(y) *Wicq. i.* 864, *et seq.*

(z) *Evans v. Higgs*, 2 Strange, 797; *Triquet v. Bath*, 3 Burr. 1478; *Hopkins v. De Robeck*, 3 T. R. 80.

(a) 2 D. & R. 25.

other hand, a public minister cannot take a person out of the custody of the law. If a man has no such privilege at the time of being arrested, no subsequent privilege can be given to him by being afterwards taken into the service of a public minister (*b*). It is not essential to the privilege, that the servant's name should have been registered in the Secretary of State's Office and transmitted to the Sheriff's Office. The statute only requires the names of persons privileged to be registered for the purpose of proceeding against the parties criminally for a violation of the act (*c*). Consequently, the circumstance of a name being registered will not give privilege, nor will the omission of the name take away privilege (*d*). It extends to servants being natives of the country wherein the minister resides as well as to his foreign servants (*e*). But it extends not to those, whose engagement or service is merely colourable. It has often been made a question, whether persons, who follow an ambassador, not for his convenience, but for their own profit, such as traders and merchants, are to be deemed part of his train. Although ambassadors have often attempted to protect such persons and to have them reckoned as part of their train, the reason of the privilege sufficiently shews, that it extends not to those, who are not in the ambassador's service (*f*). Montagu, who was bearer of letters from Henrietta Maria to Charles 1 at Oxford, during the civil war, endeavoured to pass as one of the train of the French ambassador. He was discovered and committed to the Tower by the Parliament; nor was he set at liberty, though the ambassador claimed him and made great efforts to procure his dis-

(*b*) *Heathfield v. Chilton*, 4 Burr. 2015.

(*c*) *Hopkins v. De Robeck*, 3 T. R. 80.

(*d*) *Delvalle v. Plomer*, 3 Campb. 47; *Darling v. Atkins*, 3 Wils. 33; *Fisher v. Begrery*, 1 C. & M. 117; per *Ld. Mansf. Heathfield v. Chilton*, 4 Burr. 2016.

(*e*) *Wicq. i.* 890; *Bynk. F. L. xv.*; per *cur. Lockwood v. Coysagarne*, 3 Burr. 1076.

(*f*) *Bynk. F. L. xv.*

charge (g). The law of nations, though it be liberal, yet does not give protection to screen persons, who are not *bonâ fide* servants to public ministers, but only make use of that pretence in order that they may not be liable to pay their just debts (h). Where privilege is claimed for a servant, *bonâ fide* hiring and actual service must be shewn. Hence protection was refused to a clergyman claiming it as chaplain to a Mahomedan ambassador; to the master of the horse of an ambassador, who had no horse; to the gardener of an ambassador, who had no garden; to the master of the horse, interpreter, and chaplain of ambassadors, where no service was shewn (i). So where a publisher and composer of music, making a large income by his business, claimed protection as servant of the Bavarian ambassador and first singer in the Bavarian chapel, receiving a salary of thirty pounds a-year and liable to be called upon to attend at any time; but it appeared, that he had taken the place merely for the sake of the privilege, which he supposed it to confer, and it did not appear that he had ever been called upon to perform any service. The Court held the service to be merely colourable and protection was refused (j). So where the defendant claimed protection as domestic physician to the Bavarian minister and swore, that he had prescribed for some of his servants; but there were circumstances in the case which shewed that the service was not *bonâ fide*, but a mere scheme to screen him from the payment of his debts, though the application was made on behalf of the minister (k). So where a defendant claimed privilege as valet of the Bavarian minister, but no actual per-

(g) Wicq. i. 900.

(h) Per *Ld. Mansf.*, *Heathfield v. Chilton*, 4 Burr. 2016.

(i) *Poitier v. Croza*, 1 W. Bl. 48, and the cases there cited; *Carolino's case*, 1 Wilson, 78; *Holmes v. Gurdon*, cited 1 Wilson, 20; *Seacomb v. Boulney*, 1 Wilson, 20.

(j) *Fisher v. Begerery*, 2 M. & W. 240.

(k) *Lockwood v. Coysgarne*, 3 Burr. 1676.

formance of service was shown (*l*). So where a person has any office or employment, which is incompatible with the performance of the duties of the situation which he claims to hold in an ambassador's family. Protection was refused to a purser of a ship of war, who claimed it as English secretary to the Bavarian minister (*m*). So where a tidewaiter at the Custom House claimed protection as messenger to the same minister (*n*). So where a person keeping a boarding house on her own account claimed protection as housekeeper to a foreign minister (*o*). But it is not to be expected, that every particular act of service should be specified. It is enough if bonâ fide service be proved; and if service be sufficiently proved by affidavit, the Court will not, upon bare suspicion only, suppose it to be colourable and collusive (*p*). The servant of an ambassador is not entitled to an unqualified exemption of all his goods from seizure, for taxes or otherwise. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort. It is not given for the benefit of the servant. Whatever is necessary for the convenience of an ambassador as connected with his rank, his duties, or his religion, ought to be protected; but an exemption from burthens borne by other subjects, ought not to be granted in a case to which the reason of the exemption does not apply. Thus, where the servant of an ambassador had a house, of which he let part in lodgings, and the furniture thereof was distrained for poor rates, it was held, that the furniture was not privileged. It was not denied, that the servant might have a house fit and convenient for his situation as servant of an

(*l*) *Fontainier v. Heyl*, 3 Burr. 1731.

(*m*) *Darling v. Atkins*, 3 Wilson, 33.

(*n*) *Masters v. Manby*, 1 Burr. 401.

(*o*) *Delvalle v. Plomer*, 3 Campb. 47.

(*p*) *Triquet v. Bath*, 3 Burr. 1481.



ambassador, and that the furniture of such a house might be privileged. But it was held, that as the servant let part of the house in lodgings, such an house was not necessary for his personal convenience, and, therefore, could not be necessary for that of the ambassador his master; and that the privilege claimed was not at all within the reason, upon which the rights of ambassadors are founded (*q*). An ambassador cannot waive his own privileges without the consent of his master, for the privilege of an ambassador is the privilege of his sovereign (*r*). The privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on account of those whom he represents; and this arises from the necessity of the thing, that nations may have intercourse one with another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince, by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege or protection; for by his being thrown into prison the business must inevitably suffer (*s*). Neither, for the same reason can he waive the privilege of any of his train, who are appointed by his sovereign, as the secretary of legation and the like (*t*). But he may waive the privilege of his domestic servants, whom he may engage and dismiss at pleasure, for that is a mere personal privilege for the convenience of the ambassador. The privilege is not the privilege of the servant, but the privilege of the ambassador (*u*). Hence, the ambassadors assembled at Munster and Nimeguen, in order to check the tumultuous insolence of their servants,

(*q*) *Novello v. Toogood*, 1 B. & C. 554.

(*r*) *Wicq. i.* 900; *Bynk. F. L.* xxiii.; *Vatt. iv.* § cxi.

(*s*) *Barbuit's case*, C. T. Talbot, 281.

(*t*) *Wicq. i.* 143.

(*u*) *Novello v. Toogood*, 1 B. & C. 554; per Bayley, J., *Fisher v. Begrez*, 2 M. & W. 240.

agreed that the local magistrates should be permitted to take cognizance of their offences (v).

Fourthly, With respect to the jurisdiction of an ambassador over his own household, the law of nations does not invest an ambassador with any jurisdiction or authority beyond that which belongs to any head of a family (w). Grotius, indeed, holds, that he may exercise any authority which is permitted by the sovereign in whose territories he is sent to reside. But as such sovereign has no jurisdiction over the family or train of an ambassador, it is difficult to see how he can communicate an authority which he does not possess, unless this permission be sanctioned by the sovereign by whom the ambassador is sent. By the joint consent of both sovereigns, he may exercise any jurisdiction (x). Ambassadors are in the habit of pronouncing judgment in capital cases on persons belonging to their train, where such power is given them by the sovereigns by and to whom they are sent, which obtains only in the two French embassies of Venice and Constantinople (y). When Sully was sent as ambassador extraordinary to compliment James I on his accession, one of the persons attached to the embassy killed an Englishman in a quarrel. A great tumult ensued, and the offender was pursued to the house of the ambassador. Sully immediately constituted a tribunal of his own household, convicted him on his own confession, condemned him to death, and applied to the Mayor of London for an executioner. The ordinary ambassador of France procured from James I the pardon and discharge of the offender (z). The council of the King of France blamed Sully for allowing the pardon of the King of England; but with little reason, for if he had no jurisdiction over the train of the French ambas-

(v) Wicq. i. 893—894; Bynk. F. L. xx.; Vatt. iv. 124.

(w) Grot. ii. 18, viii.; Bynk. F. L. xv. xx.

(x) Bynk. *ibid.*

(y) Mornac. ad. ff. v. i. § 3.

(z) Wicq. i. 887; Flass. ii. 218.

sador, neither had the King of France any jurisdiction in the realm of England. The pardon of the King of England, who had a right to demand justice of the King of France upon the offender, was to be construed as a release of that right, and a consent to his impunity. Henry 4 sanctioned the whole proceeding, which saved his dignity and the life of his subject, and prevented the exasperation ; which such a crime was calculated to provoke.

Bynkershoek maintains, that an ambassador may exercise civil jurisdiction over his train without the consent of the sovereign of the country, as consuls exercise jurisdiction over their own countrymen ; but the jurisdiction of consuls is exercised by the permission of the sovereign of the country (*a*). If the train of an ambassador submit to his decisions, no question can arise, but if not, he has no means of enforcing them ; for Bynkershoek admits that he cannot make a private prison of his house (*b*). If any of the train of an ambassador commit any offence, he may be secured and sent home for trial by order of the ambassador (*c*) ; or if he be liable to be dismissed at pleasure, he may be given up, as hath been before stated, to the magistrates of the country. De Lira, the Spanish ambassador at the Hague, sent home in chains one of his Spanish servants who had attempted to commit a serious offence, that he might be punished and sent to the galleys there (*d*). The usage of nations does not permit ambassadors, since they have neither sovereign authority nor territorial rights, to exercise criminal jurisdiction even within their own walls (*e*).

Fifthly, Of asylum or sanctuary. The law of nations attaches no privilege of sanctuary to the house of an ambassador (*f*). Bynkershoek observes, that nothing can be con-

(*a*) Valin Ordon. i. 9, xii. ; Kent Comm. i. 41.

(*b*) F. L. xx. p. 177.

(*c*) Wicq. ii. 890 ; Bynk. F. L. xx. ; Vatt. iv. 124.

(*d*) Bynk. *ibid*.

(*e*) Bynk. F. L. xx. p. 177.

(*f*) Grot. ii. 18, viii. ; Wicq. i. 871, 881 ; Bynk. F. L. xvi. ; Vatt. iv.

ceived more preposterous than the allowance of such a privilege; that there are few claims so absurd; that nothing can be suggested in their favour; but that Quintilian himself could give no colour to this claim. All the privileges which the law of nations confers upon ambassadors, are founded upon the necessity of providing for their security and the convenience of national intercourse; but these important objects are nowise concerned in permitting ambassadors to obstruct the course of justice, and to protect criminals who form no part of their household or train (*g*). Some Venetians, who had been detected in betraying the secrets of the republic to the French ambassador, took refuge in his house. The Senate sent troops and cannon to storm the house, and compelled the ambassador to surrender them (*h*). So the States of Holland demanded the surrender of an offender who had taken refuge in the house of the English resident, and that demand was approved by the States General (*i*). The Duke of Ripperda was seized in the house of the English ambassador at Madrid (*j*). So Cromwell is not to be blamed, as some have blamed him, for having seized a criminal in the house of the Portuguese ambassador, but because the person seized was one of the ambassador's train, and not subject to English jurisdiction (*k*). Where the privilege is allowed, it exists only by the concession of the sovereign (*l*). Where it is usual to allow it, it may yet be abolished at any time; but such abolition must be duly notified, and can only operate prospectively (*m*). Such a right cannot be prescribed for, for prescriptions must be reasonable (*n*). At Rome, the privilege hath been claimed, not only

(*g*) Bynk. F. L. xxi.

(*h*) Wicq. i. 873; Bynk. F. L. xxi.

(*i*) Bynk. *ibid*.

(*j*) Vid. Vatt. iv. § 119.

(*k*) Bynk. F. L. xxi.

(*l*) Grot. ii. 18, viii.; Wicq. i. 899, Bynk. F. L. xxi.

(*m*) Vatt. iv. 106.

(*n*) Bynk. F. L. xxi.

for the carriages of ambassadors, and for their houses, but also for the adjoining districts. Many Popes attempted to abolish it without success, through the opposition of the diplomatic body. Even Sextus 5 failed in the attempt (*o*). Some Neapolitan refugees, whom the French ambassador was assisting to return to Naples to renew their plots against the Spanish government, were made prisoners as they were passing out of the gates of Rome in the ambassador's carriage. The ambassador demanded the release of the prisoners, and satisfaction for the insult. The Pope replied, that the privilege of ambassadors does not extend to the protection of criminals; but the matter was compromised, and the prisoners were set at liberty (*p*). In 1815, the right of asylum was abolished in Rome, except as to persons charged only with misdemeanors (*q*).

In Madrid, the privilege extended to whole districts, but in 1684 it was signified to all the ambassadors, that for the future it should be confined to their houses, and they acquiesced without much difficulty (*r*).

An ambassador is privileged to have divine service performed in his house according to any form of worship that is allowed by the laws of his own country, though prohibited in the country wherein he is sent to reside. But this is for the edification of his household, and the privilege extends no farther; for this is all that is requisite for the convenience of the ambassador (*s*). The claim of Chanut, the French ambassador at Stockholm, to open his chapel to the public, had no foundation in reason or authority. He had as little right to exempt Swedish subjects from prohibitions imposed by the laws of Sweden, as the Queen would have had to apply those prohibitions to his train; and strangers residing in Sweden,

(*o*) Bynk. F. L. xxi.

(*p*) Wicq. i. 896.

(*q*) Martin. Man. dip. 65.

(*r*) Bynk. F. L. xxi.

(*s*) Vatt. iv. 104; Wicq. i. 880.

and not forming part of the train of the ambassador, were subject to the laws of Sweden during their residence no less than native Swedes. The pretension of Philip 2 to compel the train of Protestant ambassadors to attend mass at Madrid, was equally extravagant (*t*). The injunctions or prohibitions of municipal law are inapplicable to ambassadors or their train, who are not within the jurisdiction of the state.

Sixthly. Consuls are the mercantile agents of sovereigns, by whom they are appointed to protect the commercial interests of their subjects in a foreign state. They are not public ministers, and have no exemption from the civil or criminal jurisdiction of the state wherein they perform their functions (*u*). They have authority to decide any differences that may arise between their own countrymen (*v*). But the jurisdiction which they exercise is by permission of the sovereign in whose territories they reside, and his approval is necessary to perfect their appointment (*w*). The extent of their jurisdiction is determined by treaty, and in eastern states it has sometimes been allowed to an unlimited extent. Thus the treaty of Constantinople between Soliman and Francis 1 provides, that the French consuls at Constantinople, Pera, and all other towns within the Ottoman dominions, shall have exclusive jurisdiction, both civil and criminal, over French subjects, and that their sentences shall be enforced by the officers of the Sultan (*x*). The opinion of Wicquefort and Bynkershoek, which denies to consuls the character and privileges of public ministers, has been recognized by the English Courts.

Barluit, the commercial agent of the King of Prussia, claimed to be privileged as a public minister. He had a

(*t*) Wicq. i. 878, *et seq.*

(*u*) Wicq. i. 133; Bynk. F. L. x. xiii. p. 165; vid. Clarke v. Cretico, 1 Taunton, 106; Kent Comm. i. 43.

(*v*) Wicq. *ibid.*; Vatt. ii. 34; Valin. Comm. i. 9, xii.

(*w*) Mart. Man. Dip. 28; Kent. Comm. i. 42; Valin. Comm. i. 9, iii.

(*x*) Flass. Dip. Franc. i. 368.

commission as agent of commerce from the King of Prussia, directed, not to the King of England, but to all persons whom the same should concern. His commission was to do and execute whatever his Prussian Majesty should think fit to order, with regard to his subjects trading to Great Britain, to present letters, memorials, and instruments concerning trade to such persons and at such places as should be convenient, and to receive resolutions thereon. What creates my difficulty, said Lord Talbot, is, that I do not think he is entrusted to transact affairs between the two Crowns; his commission is to assist his Prussian Majesty's subjects here in their commerce, and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King, which makes his employment to be in the nature of a consul. And though he is called only an agent of commerce, I do not think the name alters the case. Indeed, there are circumstances that put him below a consul; for he wants the power of judicature, which is commonly allowed to consuls: also, their commission is commonly directed to the prince of the country, which is not the present case. But at most he is only a consul. It is the opinion of Barbeyrac, Wicquefort, and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors (y). The question of the privilege of consuls was afterwards most fully discussed in the case of the consul of the Duke of Oldenborough. The question, said Lord Ellenborough, in delivering the judgment of the Court, is reduced to this: whether this defendant is entitled to the privilege of immunity from arrest, as belonging to him in his mere character of consul. He certainly is a person invested with some authority by a foreign prince; but is he a public minister? There is not, I believe, a single writer on the law of nations, nor even of those who have written looser tracts on the same subject, who has pronounced, that a consul is *eo nomine* a public

(y) *Barbuit's case*, C. T. Talbot, 281.

ministers: and unless he be such, he is not within the comprehension of the act of Parliament.

It has been truly said, that the act is declaratory of the common law and of the law of nations: and hence it has been argued that he may be entitled to his privilege by the law of nations, though he is not expressly designated in the act. That may be so: although it is not very probable, that when the act of Parliament was passed for the purpose of laboriously and comprehensively exempting, as far as possible, all persons, who went in any manner to foreign states, which would entitle them by the law of nations to be exempted: it should have omitted to designate any persons whom it meant to include. Therefore, upon the fair understanding of the statute, the question is, whether he be a public minister? If he be, he is protected by the act, his arrest being in prejudice of the rights and privileges of public ministers. But supposing the defendant to be one of those functionaries, who may be entitled to the privilege of the law of nations: how does the case stand upon the usage as it exists under that law? In several books referred to in the course of the argument, and principally in Vattel, II, 2, 34, of consuls, I find it laid down thus: "Among the modern institutions (and therefore this institution of consul is not like that of the legates of old, of whom and of whose rights the Roman history is full, but according to Vattel, it is of modern date, and even in modern times in Grotius, who is very learned and laborious in his chapter on the subject of legate, the name never once occurs; and in Molloy there is not a word about consuls: but to proceed with Vattel) among the modern institutions for the utility of commerce, one of the most useful is that of consuls, or persons residing in the large trading cities and especially in foreign sea ports, with a commission empowering them to attend to the rights and privileges of their nation and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have a



person charged with such a commission; and as the state, which allows of this commerce, must naturally favour it, so for the same reason it is to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul must procure itself this right by treaty of commerce. He goes on: the consul is no public minister and cannot pretend to the privileges appertaining to such character. Yet having his sovereign's commission and being in this quality received by the prince in whose dominions he resides, he is to a certain degree entitled to the privileges of the law of nations." No doubt he is entitled to the protection of the law of nations, and so is every man who comes into this country from a foreign state under a safe conduct. Vattel proceeds, "the sovereign by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of a consul would be insignificant and deceptive. His functions first require, that he should not be a subject of the state where he resides; as he would be obliged in all things to conform to its orders and thus not be at liberty to acquit himself of the duties of his post." What is the case of this defendant? He is not indeed stated to be a natural born subject of this country, but he is shewn to be a person owing temporary allegiance, and it is not negatived that he is a subject born. At any rate it appears, that he is a merchant domiciled, and subject to the bankrupt laws. If he has incurred penalties under those laws, shall he be exempted from their operation by being appointed a consul of a foreign prince? Vattel says, "his functions seem to require (and this is merely argument, and it is put as doubtful) that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be imprisoned or molested, unless he himself violate the law of nations by some enormous offence." This certainly may, at first sight, seem to import, that Vattel considered a consul to be entitled to all the pri-

privileges of an ambassador. But let us advert to the fourth book of the same writer, c. 6, s. 75. In the sections immediately preceding that section, he has been discussing the various functions of ambassadors, envoys, residents, and the last description is that of ministers. He there says, s. 75, "We have spoken of consuls in the article of commerce, II, c. 2, s. 34. Formerly, agents were a kind of public ministers, but in the present increase and profusion of titles, this is given to mere commissioners appointed by princes for their private affairs, and who, not unfrequently, are subjects of the country where they reside. They are not public ministers, and consequently, not under the protection of the law of nations. But a more particular protection is due to them, than to other subjects or citizens, and some regard in consideration of the prince, whom they serve." Then, he says, "if a prince sends an agent with credentials and for public affairs, the agent from that time becomes a public minister." Then he goes to another subject and discourses of credentials, by which the character of a minister is made known to the sovereign to whom he is sent. It was so positively averred in argument, that Vattel was an authority to shew that consuls were under the protection of the law of nations, that I was desirous of consulting him; and the passage to which I have referred, shews that it is otherwise. So in another place, Bk. 4, c. 8, s. 112, he says, "A subject of a state may, even in accepting the commission of a foreign prince, remain a subject," and he adds, "that the States General of the United Provinces, in 1681, declared, that no subject of the state should be received as ambassador or minister of another power, but on condition that he should not divest himself of his quality of subject, even in regard to jurisdiction, both in civil and criminal affairs; and that whoever, in making himself known as ambassador or minister, had not mentioned his quality of subject to the state, should not enjoy those rights and privileges which are peculiar to the ministers of foreign powers." I confess, that I should be afraid

to say, that an ambassador announced under that name would not be entitled to the privileges belonging to the ministers of foreign powers, except on the condition in the above declaration. But Vattel proceeds, "such a minister may retain his former subjection tacitly, and then by a natural consequence drawn from his actions, state, and whole behaviour, it is known that he continues a subject. Thus, notwithstanding the declaration above mentioned, those Dutch merchants who procure to themselves the title of residents of some foreign prince, yet continue to trade, thereby sufficiently denote that they remain subjects." Again, I should be afraid of adopting a rule, which would leave it to the party himself, whether or not he would deprive his sovereign of the benefit resulting from the privileges belonging to his character as a public minister. However, Vattel says, "whatever inconveniences there may be in the subjection of a minister to the sovereign with whom he resides, if the foreign prince will put up with such inconveniences, and is contented with a minister on that footing, it is his own doing, and should his minister on any ignominious occasion be treated as a subject, he has no cause of complaint." This is peculiarly the case with consuls, for, in fact, they are generally the subjects of the state to which they are appointed, and in which they reside. A knowledge of the language of the country, and of the forms which exist there, such as will be best found in a subject of the country, is absolutely necessary for the discharge of their functions; and if the sovereign of a foreign state is contented to appoint a subject, he must put up with all consequences which attend his being a subject. This is according to what is laid down in Vattel, and, therefore, it is not correctly asserted, that he is at variance with the other authorities on the nature of a consul's character. Wicquefort and Barbeyrac are decidedly of the same opinion, that a consul is not entitled to the *jus gentium* belonging to ambassadors. And in Barbuit's case, Lord Talbot said, that as there was no authority for considering the defendant in any

other view, than as a consul, unless he could be satisfied that those acting in that capacity were entitled to the *jus gentium*, he could not discharge him. It appears, from a note to that case, that the government afterwards settled the matter; and very likely it was thought convenient to our relations at that time, considering our connection with the sovereign, who had appointed the consul, to soothe him by the payment of the money. That is the farthest extent to which the argument, from what was done in that case, can be carried; for Lord Talbot seems to have been of opinion, that as consul he was not entitled. The case before Lord Talbot is the only one upon the subject. *Clarke v. Cretico* (z), was decided upon the ground of the party being divested of the character of consul at the time of the arrest, but the Chief Justice seems to have inclined to the opinion, that a consul was not privileged. In the absence of all authority, either of custom, or the law of nations, how can we say that a consul is entitled to this privilege? The instances cited from Wicquefort prove the contrary. The dispute between the Pope and the Republic of Venice, is detailed at length in Beawes, from which it appears, that the violence offered to the consul of that republic by the governor of Ancona, was of such a sort, and done in such a manner, as would have entitled any sovereign state under the like circumstances to have made reclamation; their consul was grossly insulted. Nobody is disposed to deny that a consul is entitled to privileges to a certain extent, such as for safe conduct; and if that be violated, the sovereign has a right to complain of such violation. This consideration disposes of the authority which was endeavoured to be derived from that case. Then it is expressly laid down, that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking, that the act of parliament, that mentions only ambassadors and public

(z) 1 Taunt. 106.

ministers, and which was passed at a time, when it was an object studiously to comprehend all kinds of public ministers entitled to those privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried. It appears to me, that a different construction would lead to enormous inconveniences, for there is a power of creating vice consuls, and they too must have similar privileges. Thus, a consul might appoint a vice consul in every port, to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly, which the Crown could not grant directly. The mischief of this would be enormous. If we saw clearly, that the law of nations was in favour of the privilege, it would be afforded to the defendant, and it would be our duty rather to extend than to narrow it. But we are of opinion, that no such privilege exists, but that this defendant is like every other merchant liable to arrest (a).

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(a) *Viveash v. Becker*, 3 M. & S. 284, et vid. *Heathfield v. Chilton*, 4 Burr. 2016; Kent Comm. i. 44.

## CHAPTER IV.

## OF TREATIES.

**TREATIES** are contracts of independent states, for the benefit of one or more of the contracting parties (*a*). They may be considered in respect of, first, their different kinds; secondly, their duration; thirdly, their construction.

First, treaties have been divided, according to the nature of their stipulations, into equal and unequal. Equal treaties are those whereof the stipulations are reciprocal, and the parties thereto in the same condition one with another in respect of their mutual obligations. Unequal treaties are those which place one party in a better condition than another (*b*). They have also been divided according to the character of the contracting parties, into personal and real (*c*): and, according to their subject-matter, into treaties of peace; of alliance; of guaranty; of commerce and navigation, and the like.

Real treaties are contracts relating to national affairs, concluded by sovereigns in their civil capacities as representatives of the states, whose organs they are. Personal treaties are improperly called treaties, for they are not international contracts, but contracts of sovereigns in their natural capacities concerning the interests of themselves and their families (*d*). Personal treaties expire with the person who made them.

(*a*) Heinecc. El. 207.

(*b*) Grot. ii. 16, x. *et seq.*; Puff. viii. 9, vi.; Heinecc. El. ii. 207.

(*c*) Grot. ii. 16, xvi.; Puff. viii. 9, vi.; Heinecc. ii. 211.

(*d*) Heinecc. El. 211.

Therefore treaties which purport to be perpetual, or are limited to a definite period, which may by possibility exceed the life of the contracting parties, or are contracted with a sovereign and his successors, or made for the benefit of the state, are necessarily real (*e*). Hence the argument of Catherine 2 in her controversy with Louis 15 respecting the renewal of the reversals given by the Empress Elizabeth, appears to be well founded. The French government contended that the recognition of the imperial title by Louis 14, and the reversals given by Elizabeth as the condition of that recognition, were personal; but it does not appear to have occurred to them, that in that case they expired with Louis 14. On the other hand, the court of St. Petersburg contended that the imperial title being attached to the Crown of Russia, was in its nature real; and that it was therefore unnecessary to renew on a demise of the Crown the reversals given to each court when it first recognized that title, declaring that the established ceremonial should not be prejudiced by such recognition; for reversals must be of the same nature as the act to which they are accessory (*f*).

A treaty of peace is an agreement between belligerent states to settle their differences by way of compromise. From this definition it appears that peace is in its nature perpetual, so that if it be limited to a period however distant, it is not peace, but a truce; for in such cases the differences that caused the collision are kept up, and the hostile mind continues (*g*). Such truces are resorted to when it is impossible to settle the terms of peace. Thus, in 1609, a truce for twelve years was concluded between Spain and the United Provinces: and, in 1684, a truce for twenty years between France and Spain, and between France and the German Empire (*h*).

(*e*) Grot. ii. 16, xvi.; Puff. viii. 9, vi.; Heinecc. El. ii. 211; Vatt. iv. 35.

(*f*) Flass. vi. 354, *et seq.*

(*g*) Heinecc. El. ii. 217; Vatt. iv. 19.

(*h*) Flass. ii. 261—iv. 68, 69.

Since a treaty of peace is in the nature of a compromise, equality in its conditions is not requisite to its validity, and no disparity, however enormous, is any ground of objection thereto. Victorious states usually dictate the terms of peace, and the vanquished prefer submission to ruin (*i*). The objection of duress does not lie against the validity of a treaty of peace on account of the harshness of its conditions (*j*). This objection has no place where force is lawful. Between nations war is as lawful a mode of enforcing rights, as judicial process between the members of a particular state. Nor can any distinction be supported on the ground that the terms of peace have been dictated by a state that had no just cause of war. For, besides that, neither party can assume to be judge in his own cause, and to decide the question of right between himself and his antagonist. A treaty of peace, like every other compromise, operates as a release of all wrongs, and a settlement of all differences to which it relates (*k*). It is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war (*l*). Were the rules of an exact justice to be observed in it, each punctually receiving all that belongs to him, peace would be impossible. As in the most just cause we are never to lose sight of the restoration of peace, but are constantly to keep this salutary object in view: no other way is left than to compromise all the claims and grievances on both sides, and to extinguish all differences by the most equitable convention that the juncture will admit of (*m*).

The doctrine of Puffendorf on this subject is wholly unworthy of his reputation, and shews that he neither understood the meaning of Grotius, whom he criticises; nor the rule of

(*i*) Heinecc. El. 218.

(*j*) Grot. iii. 19; Vatt. iv. 37.

(*k*) Heinecc. El. ii. 219.

(*l*) The Eliza Ann, 1 Dod. 249; Heinecc. *ibid*.

(*m*) Vatt. iv. 18, cited and approved Eliza Ann, 1 Dod. 249.



the civil law, which he misapplies. In one part of his work he maintains, that a disadvantageous treaty cannot be rescinded on the ground of duress, where states engage in war without any attempt to accommodate their differences. He argues, that in that case war is in the nature of a wager, which implies a contract to abide by the event (*n*). It is characteristic of his mind, that he thinks it necessary to rest the obligation of express contracts contained in a treaty upon an implied contract, which has no existence in law or in fact. In another place he holds, that when a sovereign has offered to negotiate with an unjust aggressor, and is forced by the superiority of his arms to ratify a disadvantageous treaty of peace; such treaty may be rescinded on the ground of duress (*o*). How the injustice of the aggressor is to be ascertained he does not explain. Nor does he seem to be aware that the exceptio *metus causâ* of the Roman lawyers was only applicable in cases of unlawful force. When force was lawful it was inapplicable, as where a magistrate extorted an engagement by lawful constraint: and between independent states war supplies the place of legal process (*p*). He is equally inaccurate in the example, which he cites from ancient history, for the purpose of proving that the observance of a disadvantageous treaty is only a matter of prudence and not of legal obligation. That example only proves, that in the opinion of the historian whom he cites, where one party has violated a treaty of peace the other is justified in seizing the first favourable opportunity of renewing the war (*q*).

A treaty of peace usually contains amongst its earliest articles a stipulation of mutual amnesty. But this is unnecessary, for such a stipulation is necessarily implied from the

(*n*) Puff. v. 9, iii.

(*o*) Puff. viii. 8, i.

(*p*) Heinecc. El. l. 109—ii. 219.

(*q*) Heinecc. El. ii. 219.

nature of such a treaty (*r*). It quiets all titles of possession arising out of the war, and releases all demands for wrongs committed in the prosecution thereof (*s*). The effect of a treaty of peace in curing a defective title extends beyond a captor to all who claim under him. Thus in the case of a captured vessel, the title of the former owner is completely extinguished by a treaty of peace. And if the vessel has been transferred to the subject of another country, he also will be entitled to the same benefit from the treaty, that the captor himself would have been, if he had continued in possession. As to the enemy, it would not be lawful to look back beyond the general amnesty to examine the title of his possession. If his property is transferred, the purchaser must be entitled to the benefit of the same considerations, for otherwise it could not be said that the intervention of peace would have the effect of quieting the possession of the enemy, because if the neutral purchaser were to be dispossessed, he would have a right to resort to the belligerent seller, and to demand compensation from him. Therefore the intervention of peace puts an end to the claim of the original proprietor, and it is no longer competent to him to look back to the enemy's title, either in his own possession or in the hands of neutral purchasers. Nor can a new war, though that may change the relations of those who are parties to it, affect neutral purchasers who stand in the same situation as before. Those purchasers, though no parties to the treaty, are entitled to the full benefit of it, because they derive their rights from those who are (*t*).

Even as to wrongs committed before the war, it has been said, that when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace and is by no means to be encouraged. Treaties

(*r*) Grot. iii. 20, xvii.; Heinecc. *ibid.*; Vatt. iv. 20.

(*s*) Vatt. ii. 21; The Molly, 1 Dod. 394.

(*t*) The Schoone Sophie, 6 Rob. 138.

of peace are intended to bury in oblivion all complaints, and if grievances are not brought forward, at the time when peace is concluded, it is to be presumed that it is not intended to bring them forward at any future time. Hence it seems that every presumption is to be made against such a claim, which the nature of the circumstances will allow (*u*). Thus where a British ship had been sold by a French captor to a Spanish neutral after proceedings before the Conseil des Prises at Paris, and hostilities had subsequently ensued between Great Britain and Spain, which had been terminated by a treaty of peace, and the ship arrived in a British port, and was claimed by the former British owner ten years after the sale; the proceedings were presumed to be regular and restitution was refused (*v*).

But in strictness a treaty of peace does not extinguish demands for wrongs committed before the war; nor for wrongs committed during the war, but not in prosecution thereof; as for example, wrongs committed in a neutral country: for the effect of a compromise cannot extend beyond the matter to which it relates. A compromise must be construed with reference to the subject of the convention. It would be unjust to allow it to conclude either party as to matters which appear not to have been contemplated (*w*).

Private demands accruing before or during war may be recovered in time of peace, for war does not extinguish the right, but only suspends the remedy (*x*). Thus, where a Spanish ship captured before the commencement of hostilities was adjudged to be restored with costs and damages, but no further proceedings took place in consequence of the breaking out of war: it was held that the intervention of hostilities puts the

(*u*) Grot. iii. 20, xviii. xix.

(*v*) *The Molly*, 1 Dod. 394.

(*w*) Vatt. iv. 22. *Transactio quæcunque sit, de his tantum de quibus inter convenientes placuit, interposita creditur. Iniquum est perimi pacto id, de quo cogitatum non docetur*, ff. ii. xv. 9, § 1, 3.

(*x*) Grot. iii. 20, xvi.; Vatt. iv. 22.

property of an enemy in such a situation that confiscation may ensue ; but unless there is some declaration of the forfeiture the right of the owner revives on the return of peace (*y*). Upon the same principle contracts made with an alien enemy during war may be enforced by him on the return of peace (*z*), if they be not prohibited by the law of the country in which it is sought to enforce them (*a*).

The provision of a treaty, that all things shall be restored to the condition they were in before the war, is to be understood of real property, and does not extend to chattels, which are presumed to be abandoned by their owner from the difficulty of identification, and the slight hope of recovering them when captured (*b*). Where a treaty contains no such clause, and nothing is said about a conquered territory, it remains with the possessor whose title cannot afterwards be called in question (*c*).

When injury is committed in the prosecution of hostilities after the conclusion of a treaty of peace, it seems, that ignorance of the fact will not protect the wrong doer from civil responsibility. If, by articles, a place or district was put under the King's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a Court of Prize, to shew that he had been injured by this breach of the peace, and was entitled to compensation. If the officer acted through ignorance, his own government must protect him ; for it is the duty of government, if they put a certain district within the King's peace, to take care that due notice shall be given to those persons, by whose conduct that peace is to be maintained ; and if no such notice has been

(*y*) *Nuestra Senora des Doroles*, Edw. 62.

(*z*) *Ricord v. Bettenham*, Burr. 1734 ; *Cornu v. Blackburne*, 2 Douglas, 640 ; *Antonio v. Moreshead*, 6 Taunt. 237.

(*a*) *Ex parte Bousmaker*, 13 Vesey, Jun. 71 ; *The Hoop*, 1 Rob. 196.

(*b*) Vatt. iv. 22.

(*c*) *The Foltina*, 1 Dod. 450.

given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless at the expense of the government, whose duty it was to have given that notice (*d*).

It is a frequent practice, to stipulate in preliminary articles of a treaty of peace for a cessation of hostilities at certain times, in different latitudes, and for the restitution of property taken afterwards; and this, as well within as beyond the period stipulated for the ratification of the preliminary articles themselves. The same provision is afterwards inserted in the definitive treaty. The act of ratification operates with retrospective effect to confirm the terms of the treaty according to the provisions of the preliminary articles. There is a power lodged in the prerogative of the Crown to secure that retrospective effect to the conclusion of a treaty; to supersede the intermediate events of war; and to annul captures rightly made up to the moment of ratification, under the only known rule of action, promulgated and communicated to cruisers for the guidance of their conduct (*e*).

The owners or captors of all vessels captured or recaptured after the expiration of the periods assigned, are entitled to restitution. The period assigned for the ratification of the preliminary articles of the peace of Aix la Chapelle, signed on the 18 April, 1748, was three weeks after the signature, or sooner if possible. The period assigned for the cessation of hostilities by sea, in the channel, was twelve days from the date of the signature. The proclamation announcing the cessation of hostilities was published on the 1<sup>st</sup> May. The ship Adolphus Frederic, captured in the channel on the 1<sup>st</sup> May, was restored (*f*). So, where a British ship and cargo taken after the ratification of the treaty of peace between Great Britain and the United States, but before the period

(*d*) Per Sir W. Scott, *The Mentor*, 1 Rob. 183.

(*e*) Per Sir W. Scott, *The Elsebe*, 5 Rob. 189.

(*f*) *The Elsebe*, 5 Rob. 189, (*n*).

assigned for the cessation of hostilities at the place of capture, was recaptured after that period by a British ship of war; the Court decreed restitution of the ship and cargo to the American captors (*g*). So, where a British ship and cargo captured by an American private ship of war within the period assigned for the cessation of hostilities, but after the ratification of the treaty of peace, was recaptured by the mate after that period: the Court decreed restitution to the American captor and rescinded a former decree, whereby the ship and cargo had been restored to the owners on payment of salvage (*h*). It is to be observed, that in these cases the validity of a capture made after the ratification of a treaty of peace is taken to depend entirely on the circumstance of its having occurred before or after the expiration of the periods assigned by the treaty. These periods are also described as periods assigned for the cessation of hostilities, and this construction appears to be correct, though such are not the precise words employed in the treaties. The first article of a treaty of peace generally contains a species of preamble expressive of the pacific intentions of the contracting parties, which is wholly inoperative, as it expresses no more than is necessarily implied. Thus the first article of the preliminaries of the treaty of Amiens is conceived in these words: *Aussitôt que les préliminaires seront signés et ratifiés, l'amitié sincère sera rétablie entre la République Française et sa Majesté Britannique par terre et par mer dans toutes les parties du monde. En conséquence et pour que toutes hostilités cessent immédiatement entre les deux puissances, et entre elles et leurs alliés respectivement, les ordres seront transmis aux forces de terre et de mer avec la plus grande célérité, chacun des parties contractantes s'engageant à donner des passeports et les facilités nécessaires pour accélérer les dites ordres et d'assurer leur exécution.*

The words *en conséquence*, &c. express nothing more than

(*g*) *The Somerset*, 5 Rob. 56.

(*h*) *The Harmony*, 5 Rob. 78.

would be implied from the ratification of the preliminaries. And as these words have reference to the ratification, which in the positive provision of the preceding sentence is recognized as the date from which peace generally was to commence, it seems to follow that the word *immédiatement* must have reference to the periods assigned in a subsequent article, or to the ratification, where those periods are inapplicable; since it cannot refer to the signature.

The treaty of peace between Great Britain and Sweden contains similar expressions: *Il y aura entre leur Majestés une ferme, vraie et inviolable paix, de sorte que dès ce moment tout sujet de mésintelligence, qui ait pu subsister entre elles sera regardé comme entièrement cessant et détruit.* This treaty was signed on the 18th July, and was ratified by the Prince Regent of Great Britain on the 4th of August, and by the King of Sweden on the 17th of the same month. Some American vessels captured in Hanoë Bay on the 11th of August were claimed by the Swedish minister as taken within one mile of the mainland of Sweden, in violation of the law of nations. From the result of these dates it was contended that war had ceased, and that friendship had been re-established between Great Britain and Sweden before the date of the capture. It was said, that the treaty when ratified referred back to the time of the signature by the plenipotentiaries, and that it did so in this case more especially on account of the terms in which it was drawn. The words of the treaty, *dès ce moment tout sujet de mésintelligence, qui ait pu subsister, sera regardé comme entièrement cessant et détruit,* were pointed out, and from these it was contended that all hostilities were to cease from the moment that the treaty was signed. But the Court held that not to be the case, that the positive and enacting part of the treaty is, that there shall be a firm and inviolable peace between the two countries. The other part is descriptive only of the pacific intentions of the contracting parties, and of their agreement to bury in oblivion all the

causes of war. It does not stand in the substantive way as the former part of the article, and must be considered as mere explanatory description. Consequently it was held, that the ratification was the point from which the treaty must take effect, and that the words *des ce moment* must be referred to the moment at which the treaty received its valid existence by mutual ratification (i). But if the words of the treaty of Amiens *en consequence, &c.*, are to be construed as a substantive stipulation, it would seem that such general provision must be narrowed in construction in accordance with special stipulations on particular subjects. The ninth article of the same treaty is in these words: *Pour prévenir tous les sujets de plaintes et des contestations, qui pourraient naître à l'occasion des prises, qui seroient faites en mer après la signature des articles préliminaires : il est réciproquement convenu, que les vaisseaux et effets, qui pourraient être prises dans la manche et dans la mer du nord après l'espace de douze jours à compter de l'échange des ratifications des présens préliminaires, seroient de part et d'autre restitués: que le terme sera d'un mois depuis la manche et la mer du nord jusqu'aux isles Canaries et sans aucune exception ni autre distinction plus particulière de temps et de lieu.* The proclamation of the King of England prohibited all acts of hostility from and after the periods assigned by the treaty. The proclamation of the French consuls declared, that all prizes made in the latitudes described after the expiration of the periods assigned, should be held null and void, and should be restored. The definitive treaty of peace provided, that all prizes made after the expiration of those periods should be restored on both sides without any exception, or any other special distinction of time or place. The eleventh article of the preliminaries, by stipulating the restitution of all captures made after the periods assigned seems to import the validity of all captures previously made by vessels

(i) The *Eliza Anne*, 1 Dod. 244.



cruising in the latitudes described. Complaints and differences respecting captures made before those periods would not be prevented, if such captures could be made the subject of litigation, and any exception or special distinction of time or place other than those designated are expressly prohibited by the treaty.

Yet the Conseil des Prizes recognized an exception and distinction not expressed by the treaty, as to captures made, after the signature of the preliminaries and before the expiration of the periods assigned, by a captor having knowledge of the treaty: and held such captures to be illegal. They held, that the mere assertion of the captain of the prize was not such information as would affect the captor with such knowledge (*j*), that for that purpose the information conveyed to him must have an official character derived from one of the contracting parties, and that the knowledge of the captor must be proved by the party claiming restitution. Upon this principle a British vessel captured before the expiration of the period assigned by a French ship of war, which had sailed from the port of Guadeloupe after information there received of the ratification of preliminaries from a British frigate, and from the British governor of Dominica, was restored with costs and damages. Another British ship captured within the same period was condemned, although the captain of the prize shewed the captor the *Calcutta Gazette* extraordinary containing the proclamation of the King of England. The Court held, that the *Gazette* and proclamation imported no character of official authenticity, and that if authentic it justified the capture by the terms of its instructions to British cruisers (*k*). The distinction adopted by the Conseil des Prizes rests on the authority of Valin and Emerigon.

Emerigon says, that as it is impossible that hostilities should cease the moment that peace is concluded, since cruisers at

(j) Vid. Valin Tr. d. P. 4, 4, 3.

(k) Merlin Rep. art. Prises, Mar. tit v

sea are not informed of that event, it is usual to stipulate that captures made after different periods in different latitudes should be null and subject to restitution. But he observes, that captures made before the expiration of such periods by a captor having knowledge of peace would be equally unlawful. Because, since constructive knowledge of peace avoids captures made after the expiration of such periods, much more must the same effect be produced by actual knowledge (*1*). It is hard to discover the application of this reasoning to the point in issue. The right of capture is a belligerent right depending upon the fact of war, as soon as war determines the right ceases; and it is absurd to suppose, that ignorance can confer such a right in time of peace. The right being wholly dependent on the fact of war is necessarily independent of the knowledge of the captor. Constructive knowledge is either in the case of unavoidable ignorance, when the law for civil purposes imputes knowledge to any person by reason of the knowledge of those through whom he claims, or in the case of wilful ignorance where the law will not permit a person having means of knowledge to take advantage of his own negligence.

According to this doctrine constructive knowledge may render a captor civilly, or both civilly and criminally responsible for captures made in time of peace without actual knowledge of the fact. But this doctrine has no bearing on the question, from what periods according to the true construction of such clauses in preliminary articles are the cessation of hostilities and the commencement of peace to be reckoned in the latitudes described?

Valin contends, that the periods assigned are only intended to excuse want of notification. But this principle is wholly inapplicable, when periods are limited within the time specified for ratification, and in respect of periods beyond that time it is inadequate to the purpose expressed in the treaties of prevent-

(1) Emerig. Tr. des Ass, 12, 19.

ing all complaints and differences touching captures made after the signature of preliminaries, since it leaves all such captures open to litigation on the question of knowledge on the part of the captor.

The plain grammatical construction of such clauses leads to the conclusion, that they are intended to limit the periods for the cessation of hostilities in the latitudes specified; and this conclusion is supported by the history of such clauses, and by the construction put upon them when contained in preliminary articles, by the parties themselves in their definitive treaties. The intention of the contracting parties is most clearly expressed in the more ancient treaties.

The treaty of peace between Cromwell and Louis 14 provides, Art. I. That from this time there shall be firm peace, amity and alliance between the Republic of Great Britain and the Kingdom of France.

Art. III. That all hostilities by land and by sea and in fresh waters shall henceforth cease on both sides, and that all letters of mark and commissions shall be revoked and annulled; and that all captures made after the expiration of fourteen days from the publication of the present treaty shall be well and truly restored.

The treaty of Breda in 1667 provides, Art. I., That from this day there shall be true, firm and inviolable peace between the contracting parties and their subjects. Art. II. That for the time to come all enmities, hostilities, discords and wars between the contracting parties and their subjects cease and be abolished, and that both parties do altogether forbear and abstain from all plundering, depredation, harm-doing, injuries and infestation whatsoever, as well by land as by sea, and in fresh waters everywhere.

Art. IV. That all ships with their merchandize and all moveables, which during the war or at any time heretofore, have come into the power of either of the fore-mentioned parties or their subjects, be and remain to the present possessors

without any compensation or restitution, so as each become and remain possessor and proprietor of that which was so gotten without any controversy or exception of time, place or things. Art. V. Provides for the mutual renunciation of all actions, suits and pretensions about such matters or things as have happened during the war, or at any former time.

Art. VII. Provides, That to avoid all strife or contention hereafter, that useth sometimes to arise concerning the restitution or liquidation of such ships, merchandize or other moveables, as both parties, or either of them may pretend to have been taken or gotten in places and coasts far distant, after the peace is concluded and before it is notified unto those places ; it is agreed, that all such ships, merchandize and other moveables, which may chance to fall into either party's hands after the conclusion and publication of the present instrument, in the channel or British sea within the space of twelve days, and the same in the North sea ; and within the space of six weeks from the mouth of the channel unto the cape of St. Vincent ; as also within the space, &c., shall be and remain unto the possessors without any exception or further distinction of time or place, or any regard had to the making of restitution or compensation.

Art. VIII. It is also agreed, That under the foresaid renunciation and stipulation all letters whatsoever of reprisals, marque or countermarque, both general and particular, and others of that kind, by virtue whereof any hostility may be exercised for the future ought also to be reckoned and comprehended, and by the public authority of this alliance they are inhibited and revoked ; and if any person of either nation after such revocation shall nevertheless, under the authority of such letters or commissions already revoked, design any new mischief or act any hostility after the peace is made ; and the times specified in the preceding seventh article are elapsed, they are to be looked upon as disturbers of the public peace and punished according to the law of nations, besides an entire

restitution of the thing taken, or full satisfaction in damages, to which they shall be liable notwithstanding any clause to the contrary, which may be inserted in the said letters so revoked as aforesaid.

Art. XXXVIII. Provides, That the said treaty shall be ratified within four weeks or sooner, if it may be done.

The treaty of Westminster, 1674, provides, Art. I. That from this day there shall be a firm and inviolable peace, union and friendship betwixt the contracting parties and betwixt their subjects.

Art. II. That this good union may sooner take its effect it is agreed and concluded, that immediately upon the publication of this treaty of peace all actions of hostility shall be immediately forbid.

Art. III. But in this respect the distances of places are so different, that the orders and commands of the respective sovereigns cannot at the same time reach all their subjects; it hath been thought fit to appoint these following limits for the committing of any acts of hostility or force upon each other; viz., that after the expiration of twelve days next following the publication of this treaty, no hostility shall be acted from the soundings to the Nar in Norway; nor after the term of six weeks, &c., and whatever actions of hostility or force shall be committed after the expiration of the foressaid terms upon colour of whatsoever form of commission, letters of marque or the like, shall be deemed as illegal, and the actors obliged to make reparation and satisfaction, and punished as violators of the public peace.

Art. XL Provides for ratification within four weeks or sooner, if it may be.

The treaty of Ryswick, 1697, provides, Art. I. That there shall be an universal perpetual peace between the contracting parties.

Art. II. That all enmities, hostilities, discords and wars between the contracting parties and their subjects cease and be

abolished, so that on both sides they forbear and abstain hereafter from all plundering, devastation, harm-doing, injuries and infestation whatsoever, as well by land as by sea, and in fresh waters everywhere.

Art. IX. That all letters of marque, &c., shall be and remain null and void.

Art. X. For cutting off all matter of dispute and contention which may arise concerning the restitution of ships, merchandizes and other moveable goods which either party may complain to be taken and detained from the other in coasts far distant, after the peace is concluded and before it is notified there; all ships, merchandizes and other moveable goods, which either party may complain to be taken by either side after the signing and publication of the present treaty within the space of twelve days in the British and North seas as far as Cape St. Vincent; within the space of ten weeks, &c., shall belong and remain unto the possessors, without any exception or further distinction of time or place, or any consideration to be had of restitution or compensation.

Art. XVII. Provides for the exchange of ratifications within three weeks or sooner, if it may be.

The three first articles of the treaty of Utrecht, 1713, are copied from the treaty of Ryswick with a few verbal variations.

Art. XVII. Provides, That all letters of reprisal, &c., be and remain null, void and of no effect.

Art. XVIII. That whereas it is expressly stipulated among the conditions of the suspension of arms, made between the contracting parties the  $\frac{1}{2}$  day of August last past, in what cases ships, merchandizes and other moveable effects taken on either side should become prize to the captor, or be restored to the former proprietor; it is therefore agreed that the conditions of the aforesaid suspension of arms shall remain in full force, and that all things relating to such captures made either in the British or North seas, or in any other place, shall be well and truly executed according to the tenor of the same.

**Art. XIX.** Provides for the mutual exchange of ratifications within four weeks, or sooner if possible.

The condition of the suspension of arms, which is incorporated by reference in the treaty of Utrecht, is in the following words: *Que pour prévenir tout sujet de plaintes et de contestations, qui pourraient naître à l'occasion des vaisseaux et merchandizes et autre effets, qui seraient pris dans la manche et dans les mers du nord, après l'espace de douze jours depuis la signature de la suspension d'armes, seraient restitués de part et d'autre, &c., sans aucune exception.*

The preliminaries of the peace of Aix-la-Chapelle provide, **Art. XVI.**, That as to the cessation of hostilities by sea, the contracting parties shall pursue the conditions of the eighteenth article above cited. **Art. XXIV.** provides, That ratifications shall be exchanged in three weeks, or sooner if possible.

The definitive treaty provides, **Art. IV.**, That all ships of war, as well as merchant vessels, taken since the expiration of the terms agreed on for the cessation of hostilities, shall be faithfully restored, with all their equipages and cargoes.

The preliminaries of the peace of Paris, 1762, are to the same effect in respect of these articles as the preliminaries of the peace of Amiens.

**Art. I.**—Aussitot que les préliminaires seront signés et ratifiés, l'amitié sincère sera rétablie par terre et par mer dans toutes les parties du monde. Il sera envoyés des ordres aux armées et escadres, &c., de cesser de toutes hostilités, &c., et pour l'exécution de cette article il sera donné de part et d'autre des passeports de mer, &c.

The twenty-fourth article, which assigns the periods after which prizes shall be restored is substantially the same as the corresponding article of the preliminaries of the treaty of Amiens. The latter article agrees with the former, except that the periods are enlarged in respect of all seas but the Channel and North Seas. The twenty-sixth article stipulates the exchange of ratifications in a month, or sooner if possible.

The third article of the definitive treaty of Paris refers to the terms of the twenty-fourth article of the preliminaries as terms agreed upon for the cessation of hostilities at sea : and provides that all ships of war and merchant vessels, taken after the expiration of those terms, shall be *bonâ fide* restored with all their equipages and cargoes.

The preliminaries of the treaty of Versailles are to the same effect. The first article is copied from the preliminaries of the treaty of Paris. The twenty-second article, respecting the restitution of prizes, is the same as the corresponding article of the treaty of Amiens, which is copied from it. The twenty-third provides for the exchange of ratifications in a month. The definitive treaty refers to the twenty-second article of the preliminaries, as containing the terms agreed on for the cessation of hostilities ; and, employing the same language that is used in the treaties of Utrecht and Paris, provides that all ships of war and merchant vessels, captured since the expiration of the terms agreed on for the cessation of hostilities by sea, shall be restored *bonâ fide* with all their equipages and cargoes.

From a review of these treaties it seems to follow, that general provisions for the immediate cessation of hostilities are controlled by special provisions for the cessation of hostilities within specified latitudes ; that the same intention is expressed by the parties, whether it be said, that all ships, taken before the expiration of the specified periods, shall be and remain to the possessors ; or that all ships, taken after the expiration of such periods, shall be restored : that the latter provision, which is the modern form of expression, being copied from the armistice of Paris, must have the same meaning as if contained in an armistice, and be construed to import the cessation of hostilities only after the expiration of the periods assigned : that this construction is recognized by the parties to the treaties of Paris and Versailles, from which the clause is copied ; that the definitive treaties of Paris and Versailles



treat the periods of restitution contained in their preliminaries, which are the same as those contained in the preliminaries of the treaty of Amiens, as periods for the cessation of hostilities, and apply to them the same language which is used in the treaty of Utrecht to describe the same provisions contained in the armistice of Paris: that, consequently, ships and merchandize and other moveable effects become prize to the captor, if taken within the specified periods and within the specified latitudes. If this conclusion is correct, the doctrine of the Conseil des Prises, adopted from Valin and Emerigon, is erroneous.

The anomaly of Valin's doctrine is most apparent when he comes to apply it to neutrals.

They are no parties to a treaty of peace, and, consequently, are only affected by it collaterally, so far as it puts an end to war, and so determines all belligerent rights and neutral duties. Now his doctrine as to periods of restitution stipulated in treaties of peace is, that they are not to be considered as stipulations for the cessation of hostilities in different latitudes, but as a mere indemnity for defect of notification on the part of belligerent sovereigns to the commanders of their ships of war, public and private. If so peace commences everywhere from the ratification of the treaty; and such indemnity can effect none but those who are parties to the treaty. Yet Valin reproves Hubner for his partiality to neutrals, in maintaining that their vessels cannot lawfully be seized for any cause whatsoever, after the signature of the treaty of peace; and that, if so seized, they must be restored, whether the captor have knowledge of the peace or not. Upon the principles of Valin, the doctrine of Hubner in this instance seems to be correct, except in dating the operation of a treaty of peace from its signature, instead of its ratification.

Valin himself holds, that neutral vessels, captured after the signature of a treaty of peace (by which he probably means,

after its ratification), but without actual or constructive notice, are liable to condemnation under the same circumstances which would render them liable in time of war (*m*).

But this doctrine is clearly erroneous, according to his construction of the periods assigned in treaties of peace. For the property of neutrals is seized as the property of enemies, that is to say, of those who are enemies under the circumstances of seizure (*n*). The seizure is *jure belli*, and is wholly illegal in time of peace. Nor is there any lawful mode of ascertaining in time of peace the circumstances which would justify condemnation in time of war: for in time of peace there is no right of search; and, if no right to visit and search, then no ulterior right of seizing and bringing in, and proceeding to adjudication: and, if facts are made known to the seizer by his own unwarrantable acts, he cannot avail himself of discoveries thus unlawfully produced, nor take advantage of the consequences of his own wrong (*o*).

The other construction avoids this difficulty: for, if the periods are to be construed as periods fixed for the cessation of hostilities, there can be no ambiguity in the construction of the treaty. Peace dates from the ratification, where no special period is assigned; and from the expiration of the respective periods, in the latitudes to which they are applicable.

All property captured after the conclusion of a treaty of peace must be restored, whether the captor have knowledge of the treaty or not, unless taken within the specified periods and in the latitudes to which they are applicable. The right of capture depends upon the continuance or determination of war, which is matter of fact and wholly independent of the intention or knowledge of the captor (*p*). It is a belligerent

(*m*) Tr. des P. iv. 4.

(*n*) Per Sir W. Scott, arg.; The *Elsebe*, 5 Rob. 176.

(*o*) Le *Louis*, 2 Dod. 242.

(*p*) Grot. iii. 20, xx.

right, which is not exercisable in time of peace. When there is peace, a seizure *jure belli* is a wrongful act, and the injured party is entitled to restitution and compensation.

Seizures made by virtue of letters of reprisal issued in time of peace are beside the present question, and will be treated of hereafter.

It is not so clear, that the captor is liable to costs and damages, where peace has not been notified. When peace has been concluded, each state is bound to use due diligence to notify it to its naval and military forces; and where there has been any unnecessary delay of notification, the injured party is clearly entitled to compensation from the captor, or from his government, by whose neglect the injury has ensued. The better opinion seems to be, that the captor is liable in costs and damages, and entitled to indemnification from his government, whose duty it was to have given notice (*q*). This rule is most favourable to neutrals, because it enables them to obtain compensation through the same process whereby they obtain restitution.

In order to render the captor criminally responsible and liable to punishment as a violator of the peace; he must be affected with actual or constructive knowledge thereof. In other words, the treaty must have been notified by public authority. For a treaty is a law to the subjects of the contracting parties: and no one is punishable for the breach of a law, until it has been promulgated (*r*).

Treaties of peace commonly contain clauses for the cession of territory. Where territory is ceded, full sovereignty does not pass by the words of the treaty without actual delivery.

It is universally held, in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with the possession. A question has been made, indeed, by some writers, whether this necessity proceeds

(*q*) Per Sir W. Scott, *Mentor*, 1 Rob. 183.

(*r*) Grot. iii. 21, v.; Heinecc. *Prælec.* in loc.

from what they call the natural law of nations, or what is only conventional. Grotius (*s*) seems to consider it as proceeding only from civil institutions. Puffendorf (*t*) and Pothier (*u*) go farther. All concur, however, in holding it to be a necessary principle of jurisprudence: that to complete the right of property, the right to the thing and the possession of the thing itself should be united; or, according to the technical expression, borrowed either from the civil law, or, as Barbeyrae explains it from the commentators on the canon law, that there should be both the *jus in rem* and the *jus in re*. It is the general principle of property and applies no less to the right of territory than to other rights. Even in newly discovered countries, where a right is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, where the former rights of others are to be superseded and extinguished, it cannot be less necessary, that such a change should be indicated by some public acts, that all who are interested in the event as inhabitants of such settlements may be informed under whose dominion and under what laws they are to live. No doubt can be entertained that the practice has been conformable to this principle. The corps diplomatique is full of instances of this kind. Where stipulations of treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up and adequate powers are formally given to the persons by whom the cession is to be made. In modern times more especially such a proceeding is become almost a matter of necessity with regard to the colonial establishments of the states of Europe in the new world. The treaties by which they are affected may not be known to them for months after they are made. Many articles must remain executory only, and not executed till carried into effect, and

(*s*) ii. 6, i. 2.

(*t*) iv. 9, viii.

(*u*) Tr. de Prop. i. 2, iv. § 245, *et seq.*

until that is done by some public act the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been may be mentioned the cession of Nova Scotia to France, by treaty 21st July, 1667. The act of cession, which purports to be made in consequence of the treaty, was not drawn up till February, 1668; when full powers were sent out to deliver up the settlement to the person who should be empowered to take possession under the great seal of France. When Louisiana was ceded by France to Spain in 1762, it passed by act of cession drawn up in solemn form and dated more than a year after the treaty itself. The authority of a judicial recognition of the principle is supplied by the case of *Wroughton against Mann*. That was a case before the delegates on appeal in a revenue cause. The act of Court pleaded, that East Florida was ceded to Spain by treaty of 1803, and that eighteen months were allowed for emigration. Secondly, that the English laws continued till the Spanish government arrived and received possession from General Tonin; and the formal instruments, under which possession was afterwards taken, were exhibited. The offence charged was an act of importation contrary to the British revenue laws long after the ratification of the treaty, but before the arrival of the Spanish governor and actual delivery. It was objected, that the country had passed to Spain by virtue of the treaty; that the continuance of British possession was but an usurpation, and that the offence was no longer amenable to the British laws. If that could have been sustained, the plea must have been held bad; but it was not so held. The court of delegates were of opinion that the contract was merely executory, and that until it was carried into execution, the British possession and the British laws continued in full force (*v*).

When the forces of a belligerent have taken possession of a

conquered territory, but the conquest has not been confirmed by a treaty of peace, it is still subject to a kind of latent title in the enemy, by which he may recover it at the conclusion of the war, if the conqueror will consent to its restitution. According to the law of England a conquered country immediately forms part of the king's dominions. The island of Guadaloupe, acquired by conquest, was transferred by England to a third power, subject to the right of the former proprietor. The distinction between the two species of territories is more formal than real (*w*).

Territory that is firmly captured becomes part of the dominions of the captor (*x*), and may be transferred to a third power subject to the latent title of the enemy, by which he may recover it at the conclusion of the war, provided that the captor will consent to its restitution. A conquest of this kind may be captured during war by the state from which it was taken, but so may any other possession of a belligerent, though forming part of his original and established dominions, if the enemy has it in his power to make the conquest. The enemy may recover back such conquests when peace takes place, but the conqueror may retain it if he can; and, if nothing is said about it in the treaty it remains with the possessor, whose title cannot afterwards be called in question (*y*).

Stipulations for restitution are to be construed more liberally where they are reciprocal, than where they want mutuality; where they relate to persons, than where they relate to things; where they relate to land, than where they relate to moveables; where they relate to property possessed by the state, than where they relate to property possessed by private persons (*z*).

Where treaties of peace are founded on the basis of posses-

(*w*) The Foltina, 1 Dod. 450.

(*x*) Grot. iii. 6, iv.; Vatt. iii. § 197, 198.

(*y*) The Foltina, 1 Dod. 450; Vatt. iv. § 21.

(*z*) Grot. iii. 20, xxi.

sion, which they always are where a different basis is not expressed, questions often arise as to what constitutes possession. Thus where an armistice was concluded between the Piedmontese and the French, who had occupied Turin and Casal; a question arose, whether by the occupation of those towns they were in possession of the surrounding country, the inhabitants whereof continued to render to them the same services, which they had rendered to their own sovereign. The rule is, that the whole is possessed by occupation of a part, if an intention to appropriate the whole accompany such occupation and all others be excluded from occupying the residue. Otherwise possession of real property would be impossible as it does not admit of manual apprehension or corporal incumbency in all its parts (*a*). Two persons cannot have several possession of the same thing at the same time; such possession of one excludes the possession of another. Hence if one be in possession and another enter upon part, which is not in the actual occupation of the first, by such entry he gains possession of no more than he actually occupies. The constructive occupation of the owner is defeated by actual occupation so far as it extends. Thus it is said by Celsus, if an enemy enter a territory by force of arms, it is in possession of so much only as it occupies (*b*). When he speaks of force, he supposes resistance on behalf of the sovereign in defence of his possession. An army only possesses a country so far as it compels the enemy's forces to retire. The meaning of Paulus is probably the same, when he says, that possession of part with an appropriating mind is possession of the whole up to its boundary. By boundary he signifies the commencement of another's possession. Upon these principles the extent of hostile possession may be distinctly defined. If an army be in

(*a*) Ff. xli. 2, iii.

(*b*) Si cum magnâ vi ingressus est exercitus, eam tantummodo partem, quam intraverit, obtinet. Ff. xli. 2, xviii. 4.

possession of a principal town of a province, it is not thereby in possession of the towns and forts within the same, which hold out for the enemy. Forcible possession extends so far only as there is an absence of resistance. The occupation of part by right of conquest with intent to appropriate the whole gives possession of the whole, if the enemy maintain military possession of no portion of the residue. Under such circumstances military possession of a capital would be possession of the whole kingdom. But if any part hold out so much only is possessed as is actually conquered. Thus both the States General and the King of Spain maintained during the controversies that arose out of the truce between Spain and the United Provinces, that the possession of the surrounding country follows the possession of a town. The military possessors of the town must necessarily have the surrounding country in their power, unless there be a fortress within it; in which case the country commanded by the fortress would not be in their possession (*c*). These principles shew the absurdity of the pretensions to the Western and Eastern Empires that have been founded on the possession of Rome and Constantinople (*d*).

Secondly. Treaties of alliance are purely optional. *Pro-mittendum quia placet; servandum, quia promissum est* (*e*). Independent states may at their pleasure contract any engagements with each other, that are consistent with their subsisting obligations. Nor is this right at all affected by war. The legal rights of belligerents are equal with respect to neutral states; so that the circumstance of war can not affect the right of neutral states to ally themselves with either party. Hence, Bynkershoek carries the prohibition of interference too far, when he applies it to condemn the intervention of France,

(*c*) Bynk. Q. J. P. i. vi.

(*d*) Grot. ii. 22, xiii.; Bynk. *ibid*.

(*e*) Bynk. Q. J. P. ii. x.



Great Britain, and the States General, in favour of Denmark in its war with Sweden; and that of Great Britain and the States General, in favour of Spain in its war with France (*f*). These states might lawfully have formed an alliance with either belligerent, and it could not therefore be unlawful for them to propose to the other the terms on which they would abstain from such alliance. The prohibition of interference is founded upon the absolute and exclusive authority of every state over its territories and subjects. It is applicable to domestic dissensions, but wholly inapplicable to international disputes. The independence of Europe is concerned in preventing any state from acquiring a preponderance over all the rest; and this can only be accomplished by compelling a successful belligerent to accept reasonable terms of accommodation, through fear of a confederacy to be formed on behalf of his antagonist. All public writers agree, that any state may assist a belligerent whose cause is just; and Bynkershoek, who dissents from this opinion, so far as it seems to imply that a sovereign may render assistance without abandoning the character of a neutral, yet holds, that if the injustice of a belligerent be manifest, and his ambition formidable, it is lawful for any state to furnish assistance to his antagonist, provided it be not done clandestinely during profession of neutrality (*g*). It is difficult to see, how the justice of a cause can fetter the discretion of those who have no jurisdiction to determine its justice. Such distinctions belong rather to international morality, than to international law. But assuming the principle to be correct, yet the

(*f*) Bynk. Q. J. P. i. xxv.

(*g*) Bynk. Q. J. P. i. ix. Sin autem tam manifesta sit alterius injuria, ut ab eâ etiam mihi metuam, neque alia spes sit quam ut extremus devorer: admitti forte posset oppressum amicum esse defendendum, sed non nisi amicitia cum altero dissolutâ: manente enim amicorum nomine bellum gerere, non potest non esse impium.

injustice of a belligerent furnishes no practical limitation to the right of forming alliances with him; for the question of justice must necessarily be determined according to the judgment of the state, which contemplates an alliance; and the completion of the alliance is a declaration of its judgment. Where an alliance is formed after the commencement of hostilities, the allied sovereign is the enemy of one belligerent to the same extent that he is the ally of the other, and becomes either an auxiliary or a principal in the war. To attempt to unite the character of a neutral with the conduct of a belligerent would be an act of perfidy (*h*).

Alliances are either offensive or defensive, or both. The obligations of a defensive alliance from its very nature, are restricted to those cases in which the ally is unjustly attacked. In this case the ally must of necessity judge of the justice of the war for the purpose of determining his own obligations. If a party to a defensive alliance could call upon his ally to assist him whenever he was assailed without regard to circumstances, there would be no difference between a defensive and an offensive alliance. For means might always be employed to provoke an attack. The question, who is the assailant in war, is not to be determined by looking to see by whom the first blow is struck, but by considering by whom the provocation is given. If a prince is arming his frontier fortresses, and concentrating his forces with intent to invade the territories of his neighbour, that is a just cause of war (*i*). The sovereign, who is threatened by such preparations cannot be required to wait till they are completed, and only acts defensively by anticipating an attack. On the other hand, the arming of frontier fortresses, or the act of collecting forces without such intention, is no just cause of war (*j*); and a

(*h*) Bynk. Q. J. P. i. ix.; Vatt. iii. § 97, 99.

(*i*) Grot. ii. 1, iii.—iii. 20, xl. 3.

(*j*) Grot. ii. 22, v.; Heinecc. Comm. in loc.

sovereign, who should attack his neighbour for such acts would be acting offensively, and would have no right to demand the assistance of those who are bound to him only by a defensive alliance. Thus, when the United Provinces at the commencement of the war with England, in 1665, demanded the assistance of France, according to the terms of their defensive alliance concluded with that power in 1662; the French secretary for foreign affairs replied, that the King of England had undertaken to prove that the Dutch were the aggressors, in which case his Christian Majesty would not be bound by the treaty to give them any aid (*k*). So the United States being bound by a treaty of defensive alliance, concluded with France in 1778, held, that the stipulations of that treaty were not applicable to the war between France and Great Britain in 1793, because they considered that war to be a war of aggression upon the part of France (*l*). The same principle resolves the question put by Grotius and his followers: if two states, to whom a sovereign is bound by treaties of defensive alliance, are at war with each other, which is he bound to assist? Bynkershoek answers, that he is bound to assist that state which has given no just cause of war, and is therefore acting defensively (*m*). The justice of the war in these cases must of necessity be judged of by the ally, for the purpose of determining which party he is bound to assist (*n*). When the justice of the cause of war is doubtful, good faith requires that an allied sovereign should cause reasonable terms to be proposed to the enemy of his ally, and hold himself bound by his treaty if they are rejected (*o*).

(*k*) Flaa. iii. 537.

(*l*) Kent Comm. i. 49.

(*m*) Grot. ii. 15, xiii.; Heinecc. Comm. in loc.; Pu f. viii. 9, v.; Vatt. iii. § 93.

(*n*) Bynk. Q. J. P. i. ix. p. 209—ii. x. p. 257.

(*o*) Vatt. iii. § 86—90.

The principal questions respecting offensive and defensive alliances have arisen in reference to negotiations for peace. The rule upon this subject seems to be perfectly clear. An ally is not justified in entering upon clandestine negotiations with the common enemy. But he is not bound to carry on war to gratify the rancour or ambition of his confederates, when reasonable terms of accommodation can be procured for all parties. In such case all that good faith requires is, that he should communicate to his allies the commencement and progress of his negotiation, and reserve to them the option of becoming parties to the treaty (*p*). Treaties of alliance often contain special provisions for such contingencies.

Thirdly. Treaties of commerce and navigation are necessary to secure as a matter of right that commercial intercourse, which without treaty is merely precarious (*q*). By the common law of nations every prince or state has the right to exclude strangers from its territories, to prohibit any kind of commerce, and, consequently, to impose any conditions short of prohibition. The purpose of treaties is, to provide for the right of importing and exporting commodities; for the safety and convenience of merchants; to ascertain the amount of customs and duties; and to establish and define the jurisdiction of consuls.

Fourthly. Treaties of guaranty are where a prince becomes the guarantee of a treaty, or of the territories of another. Where a treaty is guaranteed, the guaranty is entire, and is subject to the same conditions as the treaty to which it has reference. Hence if a party to the treaty do any thing in breach of his engagements therein expressed, that is a renunciation on his part of the benefit of the treaty, and a consequent renunciation of the guaranty (*r*). A guarantee is not authorized

(*p*) Puff. viii. 9, v. ; Vatt. iv. § 16.

(*q*) Heinecc. El. ii. 208 (*n*).

(*r*) Ans. to Pruss. Mem., 1 Coll. Jur. 157.

to interfere to compel the performance of a treaty, unless required by a party guaranteed. For the contracting parties are at liberty to dispense with any of the articles of a treaty, or to vary its stipulations, or to annul it at their pleasure by mutual consent. But in such case the guaranty is discharged, for the treaty is no longer that which was guaranteed (*s*); and where a guaranty is entire it can make no difference, whether a renunciation of the treaty be by mutual consent, or by intendment of law. A guaranty cannot affect the rights of those who are strangers to the treaty (*t*). Cardinal Fleury attempted to take advantage of this principle, when France in 1741 by concluding an offensive alliance with the King of Bavaria violated its guaranty of the pragmatic sanction contained in the sixth of the preliminary articles between France and Austria, signed at Vienna on the third of October, 1735, and confirmed by the tenth article of the definitive treaty, signed at Vienna on the eighth of November, 1738 (*u*). The historian of French diplomacy stigmatizes the violation of the pragmatic sanction as a stain upon the memory of Louis 15, and an act as impolitic as it was unjust (*v*). When the subject of guaranty is a treaty of peace, the guaranty extends to all violations thereof by any of the contracting parties, whether by aggression or by breach of any of its special articles; but it does not extend to a war arising out of any new occasion of difference that has sprung up after the conclusion of the treaty (*w*). Thus the reciprocal guaranty of the peace of Westphalia provides, that each and all of the contracting parties shall maintain and uphold each and every article of the treaty;

(*s*) Vatt. ii. § 236.

(*t*) Vatt. ii. § 238.

(*u*) Koch. tab. de Rev. ii. 118; Flass. v. 94, *et seq.*

(*v*) Flass. v. 130, 142, 165.

(*w*) Puff. viii. 8, vii.; Heinecc. El. 209 (*a*), *et vid.*; Grot. iii. 20, xxvii., *et seq.*; Vatt. ii. § 42.

and that, if it shall happen that any of its articles shall be violated by any one, the injured party shall endeavour to obtain redress amicably or by process of law; but if redress cannot be so obtained within the term of three years; each and all of the contracting parties shall be bound at the request of the party injured to take arms in his defence, and to unite their forces with his (*x*). Where territories are guaranteed, the guaranty does not extend to wars provoked by the aggression of the party guaranteed. Such a guaranty is in the nature of a defensive alliance, and is governed by the same rules.

Secondly, Of the commencement and duration of treaties. Treaties are instruments in writing signed by ministers empowered for that purpose, and ratified by their sovereigns. The common form of powers necessarily implies, that treaties shall be in writing. Plenary powers convey an authority to ministers to agree, conclude and sign, and contain an engagement to ratify what they have signed. No variation of the law of nations can be introduced except by a solemn treaty in writing properly authorized and authenticated. The memory of it could not otherwise be preserved, and the parties interested and their courts of law could not otherwise take notice of it (*y*). The articles of a treaty cannot be discharged or varied by verbal declarations or agreements of ministers in the course of negotiations. What is agreed to at one period of a negotiation may be varied by agreement at another. The authority of plenipotentiaries is to agree, conclude and sign. The only evidence of what has been agreed to and concluded is the treaty itself, authenticated by their signatures. The necessity of ratification would furnish no security for sovereigns; if, when they had ratified one set of articles contained in a treaty, they could be bound by another verbally concluded by their

(*x*) Treaty of Osnabruck, art. xvii.

(*y*) Ans. to Pruss. Mem., Coll. Jur. i. 147; Grot. ii. 16, xxx.

ministers. Hence has arisen the practice of secret articles, where sovereigns wish to avoid the publication of any stipulations of a treaty which they have ratified. Yet Louis 14 contended, that the renunciation of Maria Theresa contained in the treaty of the Pyrenees was not binding, because it had been agreed and concluded by Cardinal Mazarin, upon the representation of the Spanish minister, Don Pedro Coloma; that it was a mere form. Coloma's representation amounted to no more than an expression of his opinion, that such articles are commonly rendered of no effect by the perfidy of princes. If it had amounted to an express agreement concluded between himself and Mazarin, such verbal agreement could not have varied the obligations of Louis 14 imposed by the treaty, which he had ratified. Flassan pronounces the futility of this and other arguments employed by Louis 14 to excuse his dishonesty, and declares the act of enforcing the claims of Maria Theresa to be a manifest violation of the treaty of the Pyrenees (*z*). The general powers of ministers are understood to be controlled by their special instructions (*a*), and this is implied in the promise of ratification contained in all powers. For if the signatures of ministers plenipotentiary were binding without ratification, such promises would be nugatory and ratification would be inoperative (*b*). By the usage of nations which has long prevailed a treaty is not binding until it is ratified (*c*); but when ratified it has a retrospective operation so far as it contains retrospective stipulations. Wicquefort, who maintains a contrary opinion for no other reasons apparently, but that treaties are often acted upon in confidence of ratification, and that sovereigns are bound in conscience to ratify that which has been concluded by a minister, who has not gone beyond his instructions; yet admits, that a treaty is

(*z*) Flass. Dip. Franc. iii. 347 to 351.

(*a*) Wicq. i. p. 381; Bynk. Q. J. P. ii. vii.

(*b*) Bynk. Q. J. P. ii. vii. p. 251.

(*c*) Bynk. *ibid*

not complete until it is ratified, and does not explain how an instrument can be binding before it is complete (*d*). Upon abstract principles, either in public or private transactions the acts of those who are vested with a plenary power are binding upon their principal. But as this rule was found in many cases to be attended with inconvenience, the later usage of states has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing a subsequent ratification is essentially necessary, and a strong confirmation of the truth of this position is, that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed, that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form, for the instrument in point of legal efficacy is imperfect without it. A ratification by one power alone is insufficient, it must be mutual; and the treaty is incomplete until it has been reciprocally ratified (*e*). An agent, says Vattel, is bound by his instructions; but all the engagements, that he contracts within the terms of his commission and the limits of his powers, are naturally binding upon his principal. In modern times, in order to avoid all danger and difficulty, princes reserve to themselves power to ratify what their ministers have concluded in their names. The modern usage is to put no faith in treaties, until they have been ratified. But a sovereign is bound in honour to ratify a treaty concluded by his plenipotentiary, if he has not exceeded his instructions (*f*). The signatures and forms that are necessary to ratification depend upon the constitution of each particular state (*g*). The validity of a treaty is not affected by

(*d*) Wicq. ii. p. 378.

(*e*) Eliza Ann, 1 Dod. 248.

(*f*) Vatt. ii. § 156.

(*g*) Grot. ii. 6, iii. xi.—ii. 14, xii. 6; Puff. viii. 5, ix. x. xi.; Vatt. ii. § 214.



any change in the form of government of the state, with which it is concluded (*h*). Every state is entitled to choose its own form of government and to change it at its pleasure; but it cannot discharge itself from its obligations by its own act. Bynkershoek goes yet further, and maintains that a province, that has separated itself from its parent state and established its independence, is entitled to the benefit of treaties concluded by the parent state during their union. Hence he maintains, that the United Provinces, as an independent state, were entitled to the benefit of the treaties of navigation concluded between Austria and England, and Austria and Denmark, while those provinces formed part of the Austrian dominions. Their claims were rejected both by England and Denmark; and it seems with reason, for a treaty is concluded with a state as one entire body; and, if a province separate itself from the state it ceases to be part of that body (*i*), and consequently ceases to have any interest in the treaty. Besides there would have been a want of reciprocity for the reciprocal stipulations of a treaty are entire and binding upon a state as one body, and cannot be apportioned to its different provinces. So, where a province is conquered and the conquest is consummated by cession, it ceases to be part of the state from which it has been wrested, and becomes a stranger to its treaties. But in that case the conqueror acquires no rights but those of the state, with which he is at war, and takes subject to all absolute or qualified alienations previously made. Thus the King of Prussia, when he acquired Silesia by conquest and cession, bound himself by treaty to pay the debts for which that province had been mortgaged to British merchants. But without such express stipulation Silesia would still have remained subject to the mortgage, for he could conquer no rights, but such as were vested in his enemy. So, where a neutral state has

(A) Grot. ii. 9, iii.—viii.—ii. 14, xii. 2—16, xvi.; Puff. viii. 12, i. 11, iii.; Bynk. Q. J. P. ii. xxv.

(i) Grot. ii. 9, v.; Vatt. ii. § 203.

acquired a right to maintain a permanent garrison in a town, or a right of fishery or the like (*j*). The lawfulness or unlawfulness of the acts of the chamber of annexation (*k*) instituted by Louis 14, after the cession of Alsace and the three bishoprics, for the purpose of recovering their dependencies previously alienated, depends upon this principle. If such alienations were invalid, it would seem, that by acquiring a title to the principal he acquired a title to all its accessories, unless a third party had acquired title by prescription.

A treaty is an entire contract. All its articles are dependent and have the force of conditions, so that the violation of any one of them is a violation of the whole treaty and renders it voidable at the option of the party injured (*l*). Hence the United States in 1773 declared their treaties with France to be no longer obligatory, because they had been repeatedly violated on the part of the French, and all just claims to reparation had been refused (*m*). But a treaty is not avoided by the violation of any of its articles, for a party cannot take advantage of his own wrong, or discharge himself from his obligations by his own act. Even if it be expressly stipulated that such an act shall avoid the treaty, by construction it renders it not void but voidable (*n*). Yet Louis 14, though he had ratified and twice sworn to observe the treaty of the Pyrenees, contended, that the renunciation of Maria Theresa contained therein was void, because he had not executed jointly with her a separate act of renunciation, and caused it to be registered by the parliament of Paris according to his engagement contained in the same treaty (*o*). But without such a clause a

(*j*) Vatt. ii. § 203.

(*k*) *Chambre des reunions*, *Flass.* iv. 59, *et seq.*

(*l*) *Grot.* ii. 15, xv.; *Puff.* viii. 9, xi.; *Vatt.* ii. § 200, 201, 202—iv. § 47.

(*m*) *Kent Comm.* i. 164.

(*n*) *Grot.* iii. 20, xxxviii.; *Vatt.* ii. 200.

(*o*) *Flass.* iii. 350.

treaty is rendered voidable by the violation of any of its articles, however insignificant, for it is impossible to distinguish stipulations according to their relative degrees of importance; no stipulation of sufficient importance to be inserted in a treaty can be deemed too insignificant to be binding (*p*). In order to avoid the inconvenience that may arise from the strictness of this rule it is sometimes stipulated, that a treaty shall continue in full force notwithstanding the violation of particular articles, or that the amount of damage sustained thereby shall be submitted to arbitration (*q*). The fourteenth article of the treaty concluded at Nimeguen, on the 10th of April, 1678, between France and the United Provinces provides, that if by any inadvertence any violation of the treaty should occur, it should nevertheless continue in full force, and reparation should be promptly made, and all private persons concerned in such violation should be punished.

The doctrine, that every treaty implies a condition of defeasance on any material change of circumstances, which is usually called the rule *de rebus sic stantibus*, is rejected by Grotius and Bynkershoek as calculated to destroy the obligation of all compacts (*r*). The obligations of a treaty cannot be affected by change of circumstances, unless it be such as involves the breach of a condition or renders the performance of it impossible (*s*).

It is said that treaties are perishable things, and their obligations are dissipated by the first hostility (*t*). But this is to be understood of treaties that have reference only to the peace relations of the contracting parties, and even in respect of such treaties the expression is inaccurate. It is true, that

(*p*) Grot. iii. 20, xxxv.; Vatt. iv. § 48.

(*q*) Grot. *ibid.* and iii. 19, xiv.; Puff. viii. 9, xi.; Vatt. ii. § 202.

(*r*) Grot. ii. 16, xxv. 2; Bynk. Q. J. P. ii. x.; Vatt. ii. § 296.

(*s*) Grot. *ibid.*

(*t*) Le Louis, 2 Dod. 258.

their covenants co-exist only with a state of amity among the confederate states; and that they are necessarily suspended during war, because a state of war is inconsistent with pacific relations, and leaves nothing for such treaties to operate upon during its continuance. But since a treaty of peace operates as an act of oblivion in respect of the differences, wherein war originated, and of all grievances committed or suffered in the prosecution thereof; it necessarily follows, that all engagements subsisting between belligerents at the commencement of hostilities are revived by a treaty of peace, so far as they are consistent with its provisions (*u*). For greater caution, however, in a treaty of peace it is usual expressly to renew and confirm previous treaties, so far as such treaty is not in derogation of their provisions. Thus, the third article of the treaty of Aix-la-Chapelle, in 1748, confirms and incorporates, so far as they are consistent with its provisions; the treaties of Westphalia, Madrid, Nimeguen, Ryswick, Utrecht, &c. The like provision is made by the second article of the treaty of Versailles in 1783.

But treaties that have reference to the belligerent relations of the contracting parties, are suspended during peace, and are brought into operation during war, otherwise they would be wholly insensible and inoperative (*v*). Of this kind, are treaties of sovereigns with regard to the treatment of the persons and property of the subjects of either in the territories of the other at the commencement of hostilities; to the exchange of prisoners, the regulation of cartel ships, fishing truces, and the like. So where money is lent to a sovereign prince or state, on condition that it should not be seized in case of war.

Treaties limited to a certain period determine at the ration of the period assigned; and a renewal cannot be

*u*) Puff. viii. 9, viii. Per cur. Society for Propagating the Gospel v.

*w*) Haven, 8 Wheaton, 494—cf. Vatt. iv. § 42.

*v*) Bynk. Q. J. P. ii. x.; Vatt. ii. § 175; Kent Comm. i. 165.

implied, except from reciprocal acts that admit of no other construction (w). Vattel puts the case of a treaty, whereby a state binds itself to furnish a certain number of troops annually, upon payment of an annual sum. If after the expiration of the period such sum be paid by one party, and received by the other, a renewal of the engagement is implied upon the terms contained in the treaty. But it is rather to be considered as a renewal of the engagement, than a renewal of the treaty (x).

III. Of the construction of treaties. Treaties are to be construed according to the intention of the contracting parties, to be collected from their language. If the intention of the contracting parties were always clearly defined, and expressed in distinct, precise, and unequivocal language, rules of construction would still be required. Treaties like laws are framed on general views, and it is impossible to foresee and provide for every particular case. No distinctness of expression could prevent the difficulty of applying general provisions to unforeseen emergencies. But the language, in which treaties are expressed, is generally far removed from faultless accuracy; and rules of construction are required to explain ambiguities, to reconcile apparent repugnancy, and to defeat chicanery (y).

First. The principal rule is, that treaties are to be construed according to the grammatical meaning of their language in its popular signification, unless it involve an absurdity; in which case it is to be extended or restricted, so far only as is necessary to avoid the absurdity (z). The purpose of construction is to expound treaties, not to frame them (a); and their words are not to be varied by construction, except where an absurdity is involved in their natural signification, or a different meaning

(w) Grot. ii. 15, xiv.; Vatt. ii. § 199.

(x) Vatt. *ibid.*

(y) Vatt. ii. § 262.

(z) Grot. ii. 16, ii. xii. xx. xxii.—iii. 23, xi.; Puff. v. 12, iii. viii. xix. Vatt. ii. § 271, 282.

(a) The *Jonge Josias*, 1 Edw. 131.

is plainly to be collected from the context. In conventionibus, contrahentium voluntatem, potius quam verba, spectari placuit. Prior atque potentior est, quam vox, mens dicentis (*b*). The ninth article of the treaty of Utrecht provided, that the port of Dunkirk should be destroyed: nec dicta munimenta portus moles aut aggeres denuo unquam reficiantur. The plain intention of this stipulation was, to prevent the existence of a French port of military equipment in the midst of the Channel. The King of France, while he was destroying the port of Dunkirk in accordance with the article of the treaty, was constructing at Mardick, at the distance of a league, another port of greater dimensions and importance. The English government remonstrated upon the absurdity of putting such a literal construction upon the article, as would entirely defeat its object (*c*); and the French government ultimately acquiesced, and discontinued the works (*d*). It was stipulated by the fourth article of the treaty between France and England, concluded at the Hague in 1717, that no new port should be formed within two leagues of Dunkirk and Mardick. This principal rule of construction is subject to an exception as to technical terms. Hence,—

Secondly. Words of art are to be construed according to their technical meaning (*e*).

Thus, local descriptions are to be construed according to geographical propriety of expression of the period, when the treaty was made, and not according to popular usage (*f*). So the word forts, for instance, is a word of art to be understood in its military sense; when forts are to be rendered, they are not to be demolished places (*g*). So where a treaty

(*b*) Grot. ii. 16, ii.—iii. 23, xi.; Vatt. ii. § 263, ff. l. 16, § 209—xxii. 10, § vii.

(*c*) Grot. ii. 16, xx. 2, 3.

(*d*) Flass. iv. 388, *et seq.*

(*e*) Grot. ii. 16, iii.; Puff. v. 12, iv.; Vatt. ii. § 276.

(*f*) Grot. iii. 20, xxiii.; Vatt. iv. § 33.

(*g*) Life of Sir L. Jenkins, ii. 736.

declares that certain acts shall be deemed piracy; the word piracy must be construed in its legal sense, and infer all the pains and penalties which the law of nations attaches to that crime (*h*). Hence, the subject of either contracting party apprehended by the other in the commission of the act denounced by the treaty, would be liable to be tried and punished as a pirate by the party apprehending him. For piracy is a crime, the cognizance whereof is not confined to the sovereign of the person committing the offence. Such provision, however, would only operate between the sovereigns, who are parties to the treaty.

But when the words of a treaty are equivocal, or their application ambiguous, further rules must be resorted to. Hence,—

Thirdly. Stipulations are to be taken most strongly against the party for whose benefit they are introduced. In stipulationibus, quum quæritur, quid actum sit, verba contra stipulatorem interpretanda sunt. Quidquid astringendæ obligationis est, id nisi palam verbis exprimitur, omissum intelligendum est. Fere secundum promissorem interpretamur, quia stipulatori liberum fuit verba, late concipere (*i*). It is his fault if he has not expressed all that he stipulated for; according to the maxim of the civil law, pactionem obscuram iis nocere, in quorum fuit potestate rem apertius conscribere. The terms of a treaty generally are dictated by the stronger

(*h*) Le Louis, 2 Dod. 247.

(*i*) Grot. iii. 20, xxvi.—iii. 20, xi.; Vatt. ii. § 264, 267, ff. xlv. 1, § xxxviii., ff. xlv. 1, § xcix.—cf. Grot. ii. 16, xxxii. In stipulationibus id servatur; ut, quod minus esset quodque longius, esse videretur in obligationem deductum, ibid. § cix. Veteribus placet, pactionem obscuram vel ambiguam, venditori, et qui locavit, nocere; in quorum fuit potestate rem apertius conscribere, ff. ii. 14, § xxxix. Labeo scripsit obscuritatem pacti nocere potius debere venditori, qui id dixerit, quam emptori; quia potuit re integrâ apertius dicere, ff. xviii. 1, § xxi. Obscuritas pacti nocet venditori non emptori. Cur venditori? Quia pactum ejus causâ adjectum est. Eâdem ratione oberit emptori si pactum ab emptore ejusve gratiâ adjectum fuerit. Var. not. ibid.

party. But since in the most unequal treaty some concessions are usually made to the weaker party, and some stipulations introduced for his benefit: the terms of each clause must be taken to have been dictated by the party for whose benefit it is introduced, and to express the most favourable terms which he was able to obtain or to impose. He has only himself to blame, if he has not expressed all that he was entitled to by the terms of his agreement. Thus those, who by conditions of surrender stipulate for their lives, are not entitled to their liberty; those who stipulate for their clothing, are not entitled to their arms (*j*).

Fourthly. Words are to be construed according to their subject-matter. Thus, if a truce be concluded for so many days, the word days is to be understood of civil, not of natural days (*k*).

Fifthly. Words are to be construed with reference to the context; and that construction must prevail which gives effect to the whole instrument, in preference to that which renders any part of it inoperative. Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res de quâ agitur in tuto fit (*l*).

Incivile est nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ, respondere vel judicare (*m*). These rules, especially the two last, are illustrated by the argument of Sir Leoline Jenkins on the treaty of Breda. "Another inquiry is, whether the word bona comprehends lauds and houses, as well as stock and those moveables, which we call personal estate? It cannot be denied, but that the word bona in the Roman civil law, as also in the present laws and customs of the French, comprehends both the one and the other in

(*j*) Grot. iii. 23, xii.

(*k*) Grot. ii. 16, v. xxiv; Puff. v. 12, vii.; Vatt. ii. § 280, 281, 295.

(*l*) Jonge Josias, 1 Edw. 133; Grot. ii. 16, x. xii.—iii. 19, iii.; Puff. v. 12, xii.; Vatt. ii. § 283, 285, 286, 304, *et seq.*, ff. xlv. 1, lxxx.

(*m*) Celsus, ff. i. 3, xxiv.



many cases: though in this case it does not, as may be evinced by several arguments. First, in this treaty with the Dutch and the Danes at Breda, the clauses and provisions concerning lands and immoveables on the one side, and concerning goods and moveables on the other, are still distinct and separate, as things opposite in their notion. For instance, in the treaty with the Dutch, the rights of all lands, towns, forts, places, and colonies, is in the third and sixth articles settled one way; and in the fourth and seventh, that of *bona cuncta mobilia*, another way; just so it is with Denmark in the fifth—their moveables, *quicquid bonorum*, fall under one provision, and in the sixth their territories under another; it is so in the elaborate treaty of the Pyrenees, in 1659; for moveables *des dettes, merchandises, effets, et meubles*, it has distinct articles, the twenty-second and twenty-ninth; but nothing moveable mingles with those other articles that do settle lands, territories, and real estates. So it is in the treaty of Chateau Cambresis, and several others. The territory, therefore, and sovereignty of St. Christophers being the subject-matter of the seventh article of the treaty with France; the word *bona*, in the following article, (in this treaty as well as in the others), must mean moveables, and nothing else; for the *forma communis* must needs in construction of law be here intended and observed, since the variation from it is not expressed. And it cannot be well imagined that the word *bona* should signify one thing to the Dutch and Dane, and another to the French, where both the subject-matter of the debate, and the persons treated with by the three parties, were the very same: from these circumstances the law raises, *validissimam conjecturam*, and a full light wherewithal to clear the ambiguity (n).

The same rules are illustrated by the argument of Chief Justice Eyre on the construction of the first treaty of commerce between Great Britain and the United States. The eleventh article of that treaty provides, that there shall be a

(n) Life of Sir L. Jenkins, ii. 735.

reciprocal and entirely perfect liberty of navigation and commerce between their respective people, in the manner under the limitations, and on the conditions specified in the following articles. It was contended from the etymological meaning of the word "between," that the commerce must be restricted to direct and immediate trade from the United States to the British territories, as well as from the British territories to the United States. But it was answered, that there is hardly a word in the English language less precise in its meaning or more indefinite in its application, than the word "between." According to the context it is used to express the strictest local sense to and from; or the most remote relation that any one thing can have or bear to another. For instance, when we say that the inlet from the Western Ocean to the Mediterranean is between the coast of Spain and the coast of the empire of Morocco, it marks geographical lines precisely drawn. But if we were to say, that in the intercourse between the coast of Spain and the empire of Morocco was interrupted by the religious opinions and the habits of living prevailing in the two countries, the word "between" would have no other effect than to point out the countries or nations whose intercourse is spoken of as interrupted by the causes enumerated; and would mean no more than what is meant by the same word in the eleventh article of this treaty, where the expression is between their respective people. The language of the thirteenth article is, that the citizens of the United States may freely carry on a trade between the said territories and the said United States in articles not entirely prohibited. They are, therefore, not restricted to trade in articles of the growth, produce and manufacture of the United States; it is enough, that the articles they trade in are not articles prohibited to be imported into the British territories in India, or exported from thence by any body. If then they propose to trade to the British territories in India in foreign commodities, as they may do, they must use means to furnish themselves with those commodities. In the nature of things it must be done in a

course of trade. The obvious course of trade is that they should carry their native commodities to other countries, where they can be exchanged with the most advantage for articles proper for the East India market, and that they should then proceed to India to carry on a trade there in those articles. There is nothing in the treaty to warrant the inference, that it was the intention of the contracting parties, that the trade conceded by the treaty should not be so carried on. Whether this trade should have been conceded under any qualifications or restrictions is one thing; it having been conceded, now to attempt to cramp it by a narrow, vigorous, forced construction of the words is another and a very different consideration. It cannot be supposed that an indirect advantage was intended to be reserved to the East India Company by so framing the treaty, that the American trade might by construction be put under disadvantage, because this would be a chicanery unworthy of the British government and contrary to the character of its negotiations. The nature of the trade fixes the construction of the grant. Strong arguments may be drawn from the construction of this article, and the contrast which the comparing it with the preceding article will produce. From the context it appears, that the trade was to be free, subject only to certain specific regulations. The citizens of the United States are put upon the same footing as to duties with British subjects. No question is proposed, no means of ascertaining the fact are provided, where they come from; though it is anxiously stipulated where they are to go to. The words "original cargo" are to be found in the article, and it was supposed they might be used as a ground to infer, that the trade was to be direct from the United States. But original cargo is plainly set in opposition to cargo taken in India. The provision respecting it is that, though the coasting trade is not permitted to the citizens of the United States, they may carry the cargo which they originally brought with them into the ports of the British territories, from the port of delivery to another, for the purpose of a market. The word

"original" serves the purpose for which it is used perfectly well, and it marks a total indifference to the question where the cargo was picked up. But when this article is contrasted with the language of the preceding article, the true construction of it will be seen in a still clearer light. The trade to be carried on between the citizens of the United States and the British West Indian islands by virtue of the twelfth article is required to be in goods of the growth, produce, or manufacture of the islands and United States respectively. This trade in the nature of it must be immediate and direct. The contracting parties could not look to so remote a possible case as that a citizen of the United States might load the native commodities of the United States in a foreign port; and therefore we are not driven to collect the meaning of this article from the precision of the language it uses. Its language, however, is most precise. Thus contrasted these articles afford an illustration of the internal evidence of the import and true intent and meaning of each considered separately, and the conclusion from the whole appears to be irresistible, that the trade to be carried on under the twelfth article between the United States and the British West Indian Islands is a direct trade, and that the trade to be carried on between the United States and the British territories in the East Indies under the thirteenth article may be as circuitous as the enterprising spirit of commerce can make it (o).

Sixthly. Clauses of a favourable nature are to be construed liberally; those that are odious are to be construed strictly. Provisions in furtherance of natural justice and humanity, and consequently much more those that are declaratory of the common law of nations, are favourable; those that are penal or in restraint of common right are odious. *Incommoda vitantis melior, quam commoda petentis est causa.* *Arrianus ait multum interesse quæras, utrum aliquis obligetur, an aliquis liberetur.* *Ubi de obligando quæritur, propensiores esse debere nos, si*

(o) *Marryat v. Wilson*, 1 B. & P. 430.

*habeamus occasionem, ad negandum. Ubi de liberando, ex diverso, ut facilius sis ad liberationem (p).* Thus the case of parties to be restored to their own by compact is extremely favourable. The word restitution is so favourable, that when a heinous malefactor hath it in his pardon from his prince, it does not only take off his punishment, but also restore him to his good name, honours and estates; much more than shall those that are restored *ex debito justitiæ*, recover every thing that the treaty does not in very clear and express terms deny them (*q*).

Seventhly. Where clauses of a treaty are repugnant, that which is special is to be preferred to that which is general; that which is prohibitory to that which is permissive; and the later to the earlier clause (*r*).

Eighthly. Where there is a conflict of treaties between the same parties, the latter must prevail. But where the conflict is between treaties with different parties, the former must prevail, for treaties cannot affect the rights of strangers; and every engagement made by a state is subject to its existing obligations (*s*).

Ninthly. Clauses that are conditional are inoperative until the condition is performed, and are annulled when the condition becomes impossible. Thus donations in consideration of marriage are inoperative until the marriage is celebrated, and are annulled by the death of either party before marriage (*t*).

(*p*) Grot. ii. 16, x. xii.—iii. 20, xi.; Puff. v. 12, xii., *et seq.*; Vatt. ii. § 300, 301, 303, ff. xlv. 7, § xlvii.

(*q*) Life of Sir L. Jenkins, ii. 736. As to the effect of the words, the state in which things were before the war; vid. *suprà*; and as to the relative extent of clauses of restitution as to different matters, *suprà*, p. 163.

(*r*) Grot. ii. 16, xxix.; Puff. v. 12, vi. xxiii.; Vatt. ii. § 312, 313, 314, 316.

(*s*) Vatt. ii. § 165, 315.

(*t*) Grot. ii. 16, viii.

## CHAPTER V.

## OF ARBITRATION AND REPRISALS.

THE only pacific modes of settling differences, which cannot be adjusted by negotiation, are arbitration and reprisals.

First. With respect to arbitration. An arbitrator is a person authorized by the parties in difference to decide, what shall be done with regard to the matters submitted to his judgment. Where the award of an arbitrator is final and confined to the terms of the submission, it is conclusive; unless it has been made in collusion with one of the parties (*a*). For there is no superior authority by which the validity of such an award can be examined, and consequently it is binding although it be unjust (*b*).

Where the matter in dispute is territorial the arbitrator cannot determine the possession as distinguished from the right of property. For possessory judgments are the creatures of civil law. By the law of nations the right of property draws after it the right of possession, and the possessor ought not to be prejudiced by disturbance of his possession until the question of right is determined (*c*). But this does not preclude the arbitrator from inquiring into all the circumstances of possession as part of the evidence of title (*d*).

Secondly. The right of reprisals is the right which every sovereign has to do justice to himself or to his subjects for any

(*a*) Puff. v. 13, iv.—cf. Vatt. ii. § 329.

(*b*) Grot. ii. 20, xlv. ; Puff. *ibid*.

(*c*) Grot. iii. 20, xlviii.

(*d*) Puff. v. 13, vi.

injury committed by any foreign prince or subject, where justice is denied (*e*). The exercise of the right consists in seizing any portion of the territory of the offending state, or the bodies or goods of any of its subjects, until satisfaction is obtained (*f*). Recourse is had to reprisals to enable a state to do itself justice, where redress cannot be obtained by other means. When a state has seized that which belongs to another, or refuses to repair any injury, or to pay a debt, or to redress any wrong, the state that is injured may seize any thing that belongs to the offending state, and detain or confiscate it in satisfaction of such wrong. For this purpose the property of all private persons forms part of the property of the state whereof they are members (*g*); whether as natural born subjects or as persons domiciled therein (*h*). Sovereigns act immediately upon each other, and can only regard a foreign state as an entire body of individuals possessing common interests (*i*).

Reprisals appear at first sight contrary to natural justice, as they expose the bodies and goods of innocent subjects to be seized for wrongs done by their sovereign. But this is a necessary consequence of the constitution of independent states, whereby the will of all subjects is bound by the will of the sovereign, and they become responsible for the liabilities of the state (*j*). It is an inevitable inconvenience of civilized society, and is of little consequence in comparison with the benefits derived therefrom (*k*). The same mischief occurs in war, and nothing is ground of reprisals which would not be

(*e*) Grot. iii. 2, iv.; Bynk. Q. J. P. i. xxiv.; Guidon x.; Valin Comm. iii. 10.

(*f*) Grot. iii. 2, ii. iii.; Barbey, note Puff. viii. 6, xiii.

(*g*) Vatt. ii. § 342, 344.

(*h*) Grot. iii. 2, vii.; Heinecc. Prælec. in loc.; Life of Sir L. Jenkins, ii. 713.

(*i*) Vatt. ii. § 346.

(*j*) Heinecc. Prælec. in Grot. iii. 2, ii.

(*k*) Puff. viii. 6, xiii.; Barbey, (*n*); Grot. iii. 2, ii.

ground of war, and since every one may restrict his own right and reprisals are less than war: any sovereign that has a right of war has a right of reprisals (*l*). The usage of nations renders the corporeal and incorporeal property of all subjects liable for wrongs done by their sovereigns. For otherwise great license would be allowed to their wrongful acts, as it is not so easy to lay hands on their property as on that of their subjects; and it is easier for the members of a state to obtain justice and indemnity from their sovereign, than for strangers, whose claims are often slighted (*m*). As the obligation is common to all nations, those who suffer by it on one occasion may profit by it on another, and as every state considers an injury to any of its subjects as an injury to itself; it is not unjust, that they on the other hand should be liable for the obligations of the state, which is bound to indemnify them for any losses which may ensue (*n*).

By the usage of nations, whether derived from civil or from international law, certain persons and property in the offending state are exempt from reprisals. The persons of women, children and ecclesiastics are exempt; and the persons and property of ambassadors and students; and of merchants and all other persons, whose residence is merely transitory (*o*). The same exemption attaches to property which is under the protection of the public faith (*p*). When Great Britain issued reprisals against Spain, no debts due here to Spaniards were touched, and no Spanish effects here were seized. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private

(*l*) Heinecc. El. 205 (*n*); Prælec. in Grot. iii. 2, ii.; Vatt. ii. § 354.

(*m*) Grot. iii. 2, ii.

(*n*) Grot. iii. 2, ii.; Heinecc. Prælec. in loc.; Puff. viii. 6, xiii.; Vatt. ii. § 345.

(*o*) Grot. iii. 2, vii.; Heinecc. Prælec. in loc.; Loccenius de J. M. iii. 3, ix.; Bynk. F. L. xxii.

(*p*) Vatt. ii. § 344.



man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled like other men in an adverse way by a court of justice. So scrupulously did England, France and Spain adhere to this public faith that even during the war they suffered no inquiry to be made, whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in the English funds (q). In 1752 the King of Prussia detained by way of reprisals the sums assigned upon Silesia, the payment of which he had engaged to the Empress Queen to take upon himself, and of which the reimbursement was stipulated by an express article of the treaty by which that Duchy was ceded to him. These sums were due in respect of a loan to the Emperor of Germany, Charles 6. This loan was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the Emperor's obliging himself, his heirs and posterity to repay the principal with interest, at the rate in the manner and at the times in the contract mentioned, without any delay, demur, deduction or abatement whatsoever; and lest the words and instruments made use of should not be strong enough, he promised to secure the performance of his contract in and by such other instruments, method, manner, form and words, as should be most effectual and valid to bind the said Emperor, his heirs, successors and posterity, or as the lenders should reasonably desire. As a specific security he mortgaged his revenues arising from the Duchies of Upper and Lower Silesia for payment of the principal and interest, and the whole debt, principal and interest was to be discharged in 1745. If the money could not be paid out of the revenues of Silesia, the Emperor, his heirs and posterity still remained debtors, and were bound to pay. The eviction or destruction of the thing mortgaged does not extinguish the debt or dis-

(q) Answer to Pruss. Mem., 1 Coll. Jur. 154.

charge the debtor. Therefore the Empress Queen, without the consent of the lenders, made it a condition of her yielding the Duchies of Silesia to his Prussian Majesty, that he should stand in the place of the late Emperor in respect of this debt. The seventh of the preliminary articles between the Queen of Hungary and the King of Prussia, signed at Breslaw the 11th of June, 1742, is in these words: "Sa majesté le roi de Prusse se charge de seul paiement de la somme hypothéquée sur la Silésie aux marchands Anglois selon le contract signé à Londres le 7 Janvier, 1734." This stipulation is confirmed by the ninth article of the treaty between their said Majesties, signed at Berlin the 28th of July, 1742. In consideration of the Empress Queen's cession his Prussian Majesty engaged to pay this money selon le contrat, and consequently bound himself to stand in the place of the late Emperor in respect thereof to all intents and purposes (*r*). Upon these facts the question arose, whether the King of Prussia could lawfully seize this money as reprisals. The question is discussed in the answer to the Prussian memorial, which Montesquieu characterized as an answer that admits of no reply (*s*). The Emperor, it is argued, could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction or abatement whatsoever. If these words should not extend to all possible cases, he plighted his honour to bind himself by any other form of words more effectually to pay the money; and, therefore, was liable at any time to be called upon to declare expressly that it should not be seized as reprisals or in case of war, which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian Majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general; he could not

(*r*) Answer to Pruss. Mem., 1 Coll. Jur. 154.

(*s*) Mont. litt. a l'Abbé de Guasco, 5 March, 1753—cf. Vatt. ii. § 84.

consistently with his engagements to the Empress Queen seize this money as reprisals. Besides this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors in justice and equity, be considered as if the contract had been performed, and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid (*t*).

To justify acts of reprisal there is required the authority of the sovereign signified by letters of reprisal, and to justify the issuing of such letters the sovereign must have been injured in his own rights, or in those of his subjects, without being able to obtain justice from the tribunals or sovereign of the country against which they are issued.

First. The authority of the sovereign is essential to the legality of reprisals. The right of reprisals is a right of sovereignty. As the exercise of the right approaches nearly to an open rupture, by which it is usually followed, it is naturally vested in those who have the right of declaring war; and is much too important a matter to be abandoned to the discretion of private persons (*u*). Any private person who should take upon himself to make reprisals for any injury he had received, would be guilty of piracy or robbery according to the maxim of the civil law: *hostes sunt, qui nobis aut quibus nos bellum publice decernimus, cæteri latrones aut prædones sunt* (*v*). The authority of the sovereign is signified by the grant of letters of marque and reprisal. These words are now used as synonymous. The word *marque* appears originally to have been used in a more restricted sense to signify the passing the frontiers for the purpose of reprisals; the word *reprisals*

(*t*) 1 Coll. Jur. 156.

(*u*) Guidon x. i.; Loccen. de J. M. iii. 3, iv.; Bynk. Q. J. P. i. xxiv.; Barbey, note, Grot. iii. 2, vii. 4 (*u*), and Puff. iii. 16, xiii. (*u*); Val. Comm. ii. 3, x. ii., and Traité d. P. xx. i. xiii.

(*v*) Grot. iii. 3, i.

exactly corresponds with the Saxon withernam (*w*). Letters of marque are either general or private. Private letters of marque are grantable on proof of the amount of damage, which is set forth therein in order that the surplus of property captured may be restored to the owner after the payment of damages, interest and expenses (*x*). Reprisals are therefore to be limited to a certain sum (*y*). This form is observed in the letters granted by Charles 2 to Sir Edmond Turner, and set forth at large in Molloy's work (*z*). All vessels seized by virtue of letters of marque must be brought in for adjudication in the same manner as vessels captured in time of war (*a*); that the surplus, if any, may be restored; and that, where vessels are seized that are not liable to seizure, the wrong doer may be made responsible in costs and damages (*b*).

It is said, that the practice of princes granting private letters of marque against the subjects of a power in amity is obsolete (*c*). Loccenius also states, that some princes have invariably refused private letters of marque, for fear of provoking war (*d*). Valin remarks, that such a practice is no proof of the moderation of the governments that have adopted it, or of their love of peace; but rather of their feebleness and pusillanimity; and that any sovereign, who should refuse them on such a pretext, would be regardless of his own honour, and of the justice which he owes to his subjects (*e*). It is not, however, to be supposed, that letters of marque are to be granted for any wrongs, but such as are of sufficient importance

(*w*) Grot. iii. 2 (*n*) *c.*; Val. Comm. iii. 10, i.

(*x*) Grot. iii. 2, vii.; Guidon, x. 4; Val. Comm. iii. 10, vi.

(*y*) Life of Sir L. Jenkins, ii. 779

(*z*) Jus Mar. i. 2, xv.

(*a*) Loccen. de J. M. iii. 3, 9; Molloy, *ibid.*; Val. Comm. iii. 10, v.

(*b*) Loccen. *ibid.*; Val. Comm. iii. 10, vii.

(*c*) Per Sir W. Scott, *Le Louis*, 2 Dod. 245.

(*d*) De Jur. Mar. iii. 3, iv.

(*e*) Val. Comm. iii. 10, ii.

to require such a remedy (*f*). Nor are they grantable for injury done to any but those whom a sovereign is bound to protect. Natural born subjects, and naturalized persons are entitled to them (*g*). Persons domiciled are also entitled to them on the principle of reciprocity; as their persons and goods are liable to be seized, by virtue of letters of reprisal issued against the state wherein they are domiciled (*h*). But the law of nations does not authorize reprisals for wrongs done to strangers (*i*). A sovereign has no jurisdiction to determine the justice of a complaint made by a stranger against an independent state. Besides, there would be a want of reciprocity; for a stranger is not subject to reprisals, as a subject or person domiciled. The King of England, in 1662, having issued letters of reprisal against the United Provinces, on behalf of the Knights of Malta: the States General complained of it as a violation of the law of nations, which only authorizes reprisals for the purpose of maintaining the rights of a state; and not for matters wherein it has no interest. The English government appears to have admitted the justice of this remonstrance by revoking the letters (*j*).

Secondly. There must be an injury. But it is not necessary that this injury should be accompanied with violence. To render reprisals lawful, the law of nations does not require that any act of violence shall have been committed by the prince, against whom this remedy is employed, or by his subjects: that any part of the territory of the prince, who employs it, should have been seized, or the bodies or goods of any of his subjects. It is enough if there be a denial of justice, or a refusal to pay a lawful debt, whether due from the sovereign or from his subjects (*k*). When a debt or duty

(*f*) Barbey. note, Puff. viii. 6, xiii.; Val. Comm. iii. 10, viii.

(*g*) Guidon, x. 2.

(*h*) Val. Tr. des Prises, xx. 1, ii.

(*i*) Vatt. ii. § 348.

(*j*) Vatt. *ibid*.

(*k*) Grot. iii. 2, ii.; Locc. J. M. iii. 3, iii.; Vatt. ii. § 342, 343; Val.

is due from a state or its sovereign, the right is immediate. When it is due from subjects, it is consequential, and results from the neglect of the sovereign to do justice, and to compel the payment or performance thereof (*l*). Upon complaint of the British government of captures made by Spain in time of peace, which were not adjudicated by Courts of Admiralty, according to the law of nations and treaties, but by rules, which were themselves complained of, in revenue Courts: the damages were admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed. Thereupon, general reprisals issued against Spain (*m*).

Thirdly. There must be a denial of justice. Reprisals will not lie, where there is neither a denial of justice, nor such a delay of it as amounts to a denial (*n*). The sovereign, who has been injured either in his own rights or in those of his subjects, is bound to demand satisfaction of the sovereign by whom or by whose subjects the wrong is done; more especially where wrong is done by a subject, for such wrong is not imputable to his sovereign until justice has been denied (*o*).

By the treaty of commerce between France and Flanders, in 1596, it was stipulated, that no letters of marque should be granted for the future; but the party injured should pursue his remedy by the ordinary process of law. This stipulation

Comm. iii. 10. The answer to the Prussian memorial states, that the law of nations does not allow reprisals, except in case of violent injuries. If this proposition be intended to express injuries committed with violence, it is not correct, and is not supported by the authority cited. Grot. iii. 2, iv. 5.

(*l*) *Jure gentium voluntario induci potuit et inductum apparet, ut pro eo, quod debet præstare civilis aliqua societas, aut ejus caput, sive per se primo, sive quod alieno debito jus non reddendo, se quoque obstrinxerit pro eo teneantur et obligata sint bona omnia corporalia et incorporalia eorum, qui tali societati subsunt.* Grot. iii. 2, ii.; Val. Tr. xx. 1, xvi.

(*m*) Ans. to Pruss. Mem., 1 Coll. Jur. 154.

(*n*) Life of Sir L. Jenkins, ii. 779.

(*o*) Grot. iii. 2, iv. v.; Val. Comm. iii. 10, ii.; Tr. des P. xx. 1, xvi. xvii.; Ans. to Pruss. Mem., 1 Coll. Jur. 139.

necessarily implies, that if redress cannot be had by such process, reprisals may issue; since the right of reprisals results from the denial of justice (*p*). The same remark applies to the treaty between the States General and the Emperor of Morocco, concluded in 1610; which provides, that for the future reprisals shall not issue, but each state shall do justice to the subjects of the other. The same language is used in the sixteenth article of the treaty of peace between England and Holland, in 1654: the twenty-fourth article of which treaty expressly provides, that the sovereign of the party grieved shall first apply to the prince whose subject is complained of, and if he do not cause justice to be done within three months, reprisals shall issue (*q*).

Denial of justice is either express or implied. Satisfaction is demanded through the ambassador of the prince aggrieved, resident in the state, to which complaint is to be made (*r*). If satisfaction be not given within a convenient time, such delay is construed as a denial of justice (*s*). The law upon this subject is quaintly and luminously expressed in the Guidon. *Lettres de marque ou représailles se concèdent par le roi, prince, potentat ou seigneurs souverains en leur terres: quand, hors le fait de la guerre, les sujets des diverses obéissances ont pillé, ravagé les uns sur les autres, et que par voie de justice ordinaire, droit n'est rendu aux intéressés, ou par temporisation ou délais, justice leur est déniée. Car comme le seigneur souverain, irrité contre autre prince son voisin, par son héraud ou ambassadeur demande satisfaction de tout ce qu'il prétend lui avoir été fait, si l'offense n'est amendé, il procède par voie d'armes: aussi, a leur sujets plaintifs si justice n'a été administrée, font leur griefs, mandent leur ambassadeurs, qui résident en cour vers leur*

(*p*) Val. Comm. iii. 10, ii.

(*q*) Bynk. Q. J. P. i. xxiv.

(*r*) Val. Comm. iii. 10, ii.; Tr. des P. xx. 1, xvi. xvii.

(*s*) Grot. ii. 20, v.; Val. Comm. iii. 10, ii.; Tr. des P. xx. 1, xvii.

Majestés, leur donnent temps pour adviser leurs maîtres. Si par après restitution et satisfaction n'est faite; par droit commun à toutes nations de leur plein pouvoir et propre mouvement concèdent lettres de marque contenant permission d'appréhender, saisir par force, où autrement, les biens ou marchandises des sujets de celui, qui a toléré ou passé sous silence le premier tort (t).

The terms of the armistice between Sweden and Poland, mentioned by Loccenius, provide, that reprisals shall not issue until satisfaction has been repeatedly demanded (u). In the absence of any rule prescribed by treaty, the perseverance that is required in demanding satisfaction, and the delay that should be allowed after such demand, are matters to be determined by the discretion of the sovereign, according to the special circumstances of each particular case. But several treaties concur in fixing the same period of delay; and this concurrence is deemed by Valin to be declaratory of the common law of nations upon this subject (v). By the sixteenth article of the treaty concluded at Utrecht, between France and England, on the 11th of April, 1713, it is stipulated in conformity with the ninth article of the treaty of Ryswick: that no letters of marque and reprisal shall hereafter be granted by either of their Majesties against the subjects of the other; unless there shall have been plain proof beforehand of a wrongful delay of justice; and unless the petition of him, who desires the grant of letters of reprisal, be exhibited and shewn to the minister who resides there in the name of that prince, against whose subjects those letters are demanded, that he, within the space of four months, or sooner, may make inquiry to the contrary; or procure that satisfaction be forthwith given to the plaintiff by the party accused. But in case no minister be residing there from that prince, against whose

(t) Guidon, x. 1.

(u) Locc. de J. M. iii. 3, iv.

(v) Val. Comm. iii. 10, ii.; Tr. des P. xx. 1, xx.



subjects reprisals are demanded, that letters of reprisal be not granted till after the space of four months, to be computed from the day whenever the petition was exhibited and presented to the prince, against whose subjects reprisals are desired, or to his privy council. The same provision is contained in the treaty of commerce and navigation concluded at Utrecht, between the same powers on the same day. The third article of the treaty of Madrid, between Great Britain and Spain, in 1667, which is incorporated in the commercial treaty, concluded between Great Britain and Spain at Utrecht, on the 9th of December, 1713, differs from the treaty of Utrecht between Great Britain and France, in allowing a delay of six months instead of four. The delay of four months is stipulated in the treaty of Utrecht between France and the United Provinces. The same period was prescribed by the seventeenth article of the treaty of Paris, in 1662, between France and the United Provinces. From these precedents it seems to follow, that a sovereign could not be accused of precipitancy, who allowed a delay of four months from the presentation of the petition before the issue of letters of marque.

When the matter of complaint is a proper subject for judicial investigation, recourse must first be had to the ordinary process of law. A subject of one state, who has been injured by or has any demand against a person living in the dominions of another, ought to apply for redress in the Courts of Justice of the sovereign of whom such person is a subject. If the subject of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicature established to try such questions. The law of nations founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of justice absolutely denied in *re minime dubiâ*, by all the tribunals, and afterwards by the prince. Where Courts are equally open and indifferent to

foreigner and native, and the Judges are left free, and give sentence according to their conscience; though it should be erroneous, that would be no ground of reprisals. Upon doubtful questions different men think and judge differently; and all that a friend can desire, is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose Courts the matter is tried (*w*).

Where a matter is doubtful, the sentence of a competent tribunal is always presumed to be just (*x*). But where Courts are not equally open to foreigners and natives; or where unfair distinctions are established to the prejudice of foreigners; or justice is not indifferently administered; or a sentence manifestly unjust is pronounced in a matter that is not doubtful; recourse must be had to the sovereign, and if justice be denied, or affectedly delayed by him, the law of nations admits of reprisals (*y*). Even where a matter admits of no doubt, a subject is bound to submit to an unjust sentence of a Court of the last resort: but the rights of a foreigner may be enforced by reprisals, if justice be denied by the sovereign (*z*). So where the matter of complaint is an injury committed or supported by a sovereign; or a demand upon a prince or state, for which satisfaction is refused (*a*).

(*w*) Ans. to Pruss. Mem., 1 Coll. Jur. 138.

(*x*) Grot. iii. 2, v.; Barbey. note, Puff. viii. 6, xiii.; Vatt. ii. 84, 350.

(*y*) Grot. iii. 2, v.; Vatt. ii. § 84, 350; Barbey. note, Puff. viii. 6, xiii.

(*z*) Grot. iii. 2, v.

(*a*) Grot. iii. 2, ii.

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## CHAPTER VI.

## OF OFFENCES AGAINST THE LAW OF NATIONS.

**THE** principal offences against the law of nations that are cognizable by judicial tribunals are first, offences against ambassadors, which have been considered in a former chapter.

**Secondly.** Violation of safe conducts.

**Thirdly.** Libels against sovereign princes and eminent persons in foreign states.

**Fourthly.** Piracy.

A safe conduct is either express or implied. Express safe conducts are given only in time of war. All foreigners, who are in the territories of any state in time of peace, are there under an implied safe conduct. During the continuance of safe conduct, either express or implied, a foreigner is under the protection of the sovereign; and if any violation of his rights, either in person or property be not punished by the sovereign, it becomes just ground of war (*a*). The statute 31 Henry 6, c. 4, enacts, that if any of the King's subjects attempt or offend upon the sea, or in any port within the King's obedience against any stranger in amity, league, or truce, or under safe conduct; and especially by attacking his person, or spoiling him, or robbing him of his goods, the Lord Chancellor, with any of the justices of either the King's Bench or Common Pleas, may cause full restitution and amends to be made to the party injured. The law of the United States provides, that if any person shall violate any safe conduct or passport, granted under the authority of the United States, he shall on convic-

(*a*) Bla. Comm. iv. 66.

tion be imprisoned not exceeding three years, and fined at the discretion of the court (*b*).

Thirdly. Upon the ground that malicious and scurrilous reflections upon those that are possessed of rank and influence in foreign states, may tend to involve this country in disputes and warfare, it has been held, that publications tending to degrade and defame persons in considerable stations of power and dignity in foreign countries may be treated as libels (*c*). Thus, an information was filed by the command of the Crown for a libel on a French ambassador, then residing at the British court, consisting principally of angry reflections on his public conduct, charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the Court of Versailles, and the defendant was convicted (*d*). Lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; upon which Mr. Justice Ashurst observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress offences of so dangerous a nature; and that such libels might be supposed to have been published with the connivance of the state, unless the authors were subjected to punishment (*e*). So, a defendant was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law

(*b*) Kent Comm. i. 170.

(*c*) Russell on Crimes, i. 232.

(*d*) *R. v. D'Eon*, 1 Black. Rep. 510.

(*e*) Russell on Crimes, 233.

a hundred sail of vessels are likely to return to this country without freight."

In a case, which occurred shortly afterwards, where the defendant was charged by an information with a libel on Napoleon Buonaparte; Lord Ellenborough in his address to the jury said: "I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries may be taken to be and treated as a libel; and particularly, when it has a tendency to interrupt the pacific relations between the two countries" (*f*).

Fourthly. Of piracy. A pirate is a rover and a robber upon the sea, and an enemy of the human race (*g*). The marine ordinance of Louis 14 defines pirates to be sea rovers, who have no commission from any sovereign prince (*h*). Bynkershoek defines them to be those, who commit depredations on the high seas without the authority of any sovereign (*i*). This definition is borrowed from the maxim of the civil law: *hostes sunt, qui notis aut quibus nos vellum publica dicernimus; cæteri latrones aut prædones sunt* (*j*): modified by the practice of reprisals which was unknown to the Romans (*k*). As every man by the usage of European nations is justiciable in the place where the crime is committed; pirates, being reputed out of all laws and privileges, are to be tried in what ports soever they are taken (*l*). Any pirate may be tried in any country to which he is brought or in which he is found; being an enemy of all mankind he is subject to the jurisdiction of any sovereign within whose power he is brought (*m*). But

(*f*) Russell on Crimes, 233.

(*g*) 3 Inst. 113; Val. Ord. iii. 9, iii.

(*h*) Val. Ord. iii. 9, iv.

(*i*) Bynk. Q. J. P. i. xvii.

(*j*) Grot. iii. 3, ii.

(*k*) Bynk. Q. J. P. i. xxiv.

(*l*) Life of Sir L. Jenkins, ii. 714.

(*m*) Bynk. Q. J. P. i. xvii. p. 223.

the law distinguishes between a pirate, who is a highwayman, and sets up for robbing, either having no commission at all, or else two or three, and a lawful man of war, who exceeds his commission. Such excesses, abstracted from the damages and affronts they give, are solely against the prince who gives the commission, and consequently punishable by him only as transgressions of his rule and aberrations from his service (*n*).

Nor is there any distinction in this respect between public and private commissioned vessels; the latter are ships of the sovereign as long as they sail under his commission unrevoked (*o*).

Nor is there any distinction as to commissions given by piratical states. A Bristol merchantman taken by an Algerine man of war was driven by stress of weather upon the coast of Ireland, and there seized, together with some Turks and renegadoes on board it. Sir Leoline Jenkins was consulted and gave his opinion, that as to the Moors and Turks, that were so by birth, found on board this ship; since the government of Algiers had been owned as well by several treaties of peace and declarations of war, as by the establishment of trade and even of consuls and residents amongst them by so many princes and states, and particularly by the King of England, they could not be proceeded against as pirates or sea-rovers acting without commission, but were to have the privileges of enemies in an open war. That the Spanish renegade was to be treated as a prisoner of war, and could not be proceeded against as a pirate. But as for the English renegade, an indictment of high treason would lie against him for levying war against the King, and adhering to his enemies (*p*).

So by the law of France and America, a French or American subject levying war against his country or attacking vessels thereof by colour of a commission from a foreign prince is liable

(*n*) Life of Sir L. Jenkins, ii. 714; Bynk. i. xvii.

(*o*) Ibid.

(*p*) Life of Sir L. Jenkins, ii. 791; Grot. iii. 3, ii.; Bynk. Q. J. P. i. xvii.; Helena, 4 Rob. 3.

to capital punishment (*q*). Robbery or murder committed on the high seas on board a vessel belonging to and acknowledging the jurisdiction of any state, would not fall within the definition of piracy. Such an offence would be subject exclusively to the jurisdiction of the state to which the vessel belongs (*r*). Such a vessel is as much within the jurisdiction of its state as any part of its territory (*s*). But it would be otherwise if such a crime were committed on board a vessel in possession of a crew acting in defiance of all law, and acknowledging obedience to no government (*t*). Such persons are professed pirates, the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war (*u*). The penalty of piracy is death and confiscation of property (*v*). Any one may seize and bring pirates to justice, but no one is justified in killing them, except in combat; for the proper tribunal of the country to which they are brought must determine, whether the facts proved against them amount to the crime of piracy or not (*w*).

Many acts are declared to be piracy by the municipal laws of particular states; but such acts, unless they amount to piracy by the law of nations, are piracy only when committed by the subjects of the state by which such law is enacted, and are exclusively cognizable by its tribunals.

(*q*) Val. iii. 9, iii.; Kent Comm. i. 179.

(*r*) United States *v.* Palmer, 3 Wheaton, 610; Kent Comm. i. 174.

(*s*) Vatt. i. § 216.

(*t*) United States *v.* Clintoek, 5 Wheaton, 144; Kent Comm. i. 175.

(*u*) Le Louis, 2 Dod. 244.

(*v*) Bynk. Q. J. P. i. xvii.; Val. Ord. iii. 9, iii.

(*w*) Val. Ord. iii. 9, iii.

END OF VOL. I.





6

**INSTITUTES**

**OF**

**INTERNATIONAL LAW.**

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**BY**  
**RICHARD WILDMAN, Esq.,**  
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**VOL. II.**

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**INTERNATIONAL RIGHTS**

**IN**

**TIME OF WAR.**

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# INSTITUTES

OF

## INTERNATIONAL LAW.

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### CHAPTER I.

#### OF THE STATE OF WAR.

IN treating of international rights in time of war, there is to be considered, first, the general effect of the state of war; secondly, the national character of persons and things, which is essential to determine the rights and duties of neutrals and belligerents with respect to them; next the right of belligerents to seize the property of the enemy, which leads, thirdly, to the right of search; then their right to prevent neutrals from interposing in the war, which produces, fourthly, the right of blockade, and fifthly, the right of capturing contraband; next the right, which belligerents possess of relaxing their belligerent rights, which gives rise, sixthly, to licenses, and seventhly, to ransom; eighthly, the exercise of those rights in the recapture of property, which gives rise to the doctrine of salvage; and ninthly, in the distribution of prizes; tenthly, the judicial determination of those rights, or the jurisdiction and practice of Prize Courts.

War is, where a sovereign state prosecutes its claims by force of arms; Bynkershoek adds, or by stratagem; but stratagem is but a mode of applying force (a). The justice or

(a) Bynk. Q. J. P. i. 1; Heinecc. El. ii. § 181.

injustice of a war occasions no difference in its legal effects, for every belligerent claims to have right; and as to neutral states—

————— *Quis justius induit arma*  
*Scire nefas—*

the law of nations forbids them to interpose in the war, or to adjudicate upon the justice of the quarrel (*b*).

The invasion of territory, or other violent aggression; or the gathering of forces with a manifest purpose of aggression; or the violation of any legal right, or the breach of any legal duty followed by a refusal of satisfaction, is lawful ground of war (*c*). But in all cases, except that of merely defensive war, a previous demand of satisfaction is required; especially where an injury is committed, not by the prince, but by his subjects; in which case it is only by refusing satisfaction that he becomes their accomplice (*d*).

Whatever is lawful ground of reprisals is lawful ground of war, for the former only differ from the latter, because a sovereign having right of war disclaims the character of a belligerent, and limits the exercise of his right to acts of reprisal. Consequently the same principle, that disallows the right of reprisals in cases that are not free from doubt, applies equally to the right of war. The grounds of war ought to be perfectly clear and evident (*e*).

Grotius divides war into that which is solemn, and that which wants solemnity (*f*). This subject is incidentally, but accurately treated by Lord Hale in his chapter concerning

(*b*) Grot. iii. 9, iv. 2—iii. 2, 1—iii. 4, iv.; Puff. viii. 6, xv.; Bynk. Q. J. P. i. ix.; Vatt. iii. §§ 50. 188. 190, 191.

(*c*) Grot. ii. 1, §§ i. 11.—ii. 2, 1.—ii. 22, v.—iii. 20, xl. 3; Puff. viii. 6, iii. and v.; Bynk. Q. J. P. i. 1; Heinecc. ii. El. § 195; Vatt. iii. §§ 26. 28. 41.

(*d*) Grot. iii. 3, vi. 2; Puff. viii. 6, xii.; Bynk. Q. J. P. i. 11; Heinecc. El. ii. § 200.

(*e*) Grot. ii. 26, iv. 5; Puff. viii. 6, iv.

(*f*) Grot. i. 3, iv.

treason in adhering to the king's enemies. War, says Lord Hale, was anciently of two kinds, *bellum solemne vel non solemne*. A solemn war among the Romans had many circumstances attending it, and was not presently undertaken upon an injury received without these solemn circumstances; first, *clarigatio* or demanding reparation for the injuries received; secondly, that being done, there followed indiction or denunciation of war; thirdly, dilation or a space of thirty-three days, before actual hostility was used; but most times necessity and politic considerations, both among them and other nations, did dispense with these solemnities, which were found oftentimes too cumbersome and inconvenient, especially when the delays might occasion surprisal or irreparable damage to the commonwealth, as when the adverse party made preparations, which, if not suddenly suppressed, might prove more dangerous and irresistible.

But these solemn denunciations of war had place only in offensive or invasive wars, and even there had many exceptions. First, if a war be actually between two princes or states, and a temporary truce be made as for a year or two, that term being elapsed, they are in a state of war without any denunciation, for they are in the former condition, wherein they were before the truce were made. Secondly, in case a foreign prince in peace violate that peace and become the aggressor, or invade the other, though without any denunciation, the prince that is upon his defence was not bound, neither was it necessary for him to make a solemn denunciation or proclamation of war, for this solemnity of denunciation was thought only requisite on the part of the aggressor. Thirdly, if after reparation of injuries sought, instead of a reparation of the former, new are committed by the adverse prince, as killing an ambassador, contemptuous rejection of all reparation or mediation touching it; great provisions of hostility, or the like, then this denunciation or dilation was not requisite in the aggressor; but when all is done, supreme

princes and states take themselves to be judges of public injuries, and of the manner, means and seasons for their reparation, and what they judge safest and most for their advantage is commonly done in these cases, and they seldom want fair declarations to justify themselves therein. And, therefore, whether these handsome methods be observed or not, yet if, *de facto*, there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies to each other. But now for the most part these ancient solemnities are antiquated; I come, therefore, to the practice of our own country and modern arms, and what we may observe from our own books, history and monuments.

We may observe, that in the wars we have had with foreign countries, that they have been of two kinds, special and general; special kinds of war are those, which we usually call *marque* or reprisals; and these again are of two kinds, particular granted to some particular persons on particular occasions to right themselves; secondly, general *marque* or reprisal, which, though it have the effect of a war, yet it is not a regular war. It doth not make the two nations in a perfect state of hostility between them, though they mutually take one from another as enemies, and many times these general reprisals grow into a very formed war; and this was the condition between us and the Dutch, February 22, 1664, the first beginning whereof was by that act of council, which instituted only a kind of universal reprisal, and there were particular reasons of state for it; but in process of time it grew into a very war, and that without any war solemnly denounced.

A general war is of two kinds, *bellum solemniter denunciatum*, or *bellum non solemniter denunciatum*; the former sort of war is, when war is solemnly declared or proclaimed by one king against another prince or state; thus, after the pacification between the King and the Dutch at Breda upon new injuries done to us by the Dutch, the King by his



printed declaration, 1671, declared war against them; and this is the most formal solemnity of war that is now in use.

A war, that is non solemniter denunciatum, is when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us. The first Dutch war was a real war; and yet it began barely upon general letters of marque. Again, if a foreign prince invades our coasts, or sets upon the King's navy at sea, hereupon a real, though not a solemn war, may arise, and hath formerly arisen, and, therefore, to prove a nation to be at enmity with England, or to prove a person to be an alien enemy, there is no necessity of shewing any war proclaimed; but it may be averred, and so put upon trial by the country, whether there was a war or not.

And in very deed there was a war between the Crowns of England and Spain; and Spaniards were actual enemies, especially after the attempt at invasion in 1588, by the Spanish Armada, and yet there was no war declared or proclaimed between the Crowns, as appears by Camden; so that a state of war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it (*g*).

Grotius holds a previous declaration to be essential to the lawfulness of war; and his opinion is adopted by Puffendorf (*h*). Grotius considers such a declaration to be requisite for the purpose of shewing that the war is sanctioned by sovereign authority. But that sanction is involved in the definition of war; acts of violence wanting that sanction are mere acts of rapine and piracy. However convenient for this purpose the practice may have been in the time of Grotius, before the institution of resident ambassadors, it has long ceased to be required by the relations and usages of modern states. For any other purpose, such a declaration, according to his view of it, is wholly inoperative; for he does

(*g*) Hale, P. C. i. 160.

(*h*) Grot. iii. 3, v. xi. xii.; Puff. viii. 6, ix.

not deem it necessary to allow any interval between the declaration and the commencement of hostilities (i).

But war may exist without any declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country is not, as it has been represented, a mere challenge to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only. Hence, it was held that Great Britain and Sweden were at war in 1812, although war had only been declared on the part of Sweden; and the treaty of peace between the two countries contained a direct recognition of the existence of an antecedent state of war (k).

The distinction of Grotius is rejected by Bynkershoek and Heineccius as utterly futile, upon the ground that it never can be a matter of doubt that public war is sanctioned by sovereign authority, so that for that purpose a declaration is an idle ceremony; and no distinction has ever existed as to legal effect between wars that have been, and those that have not been declared (l). The opinion of Bynkershoek and Heineccius is in accordance with the modern practice of nations.

The war of independence between the United Provinces and Spain, began with mutual hostilities, without any declaration of war; yet no one ever doubted of the lawfulness of the war, of the lawfulness of the victory, and of the lawfulness of the treaty of peace that followed it. War may lawfully commence with actual hostilities; and Bynkershoek expresses no approbation of the absurd complaint of the Dutch, that the King of Spain had seized and condemned their vessels in 1598,

(i) Grot. iii. 3, xiii.; Vatt. iii. § 60.

(k) The Eliza Ann, 1 Dod. 244; The Nayade, 4 Rob. 253.

(l) Bynk. Q. J. P. i. 11; Heinecc. El. ii. § 198; Pothier Tr. d'Ass. i. 2, § 84; Emerig. Trait. des Ass. iii. 5—xii. 35, p. 563; Val. Comm. iii. 6, iii. p. 34.

without a previous declaration of war, when they had been at open war with him since the year 1581. The existence of the war is expressly recognised in the preamble, and in the second article of the treaty of Munster. Gustavus Adolphus made war upon the Emperor of Germany without a previous declaration, and replied to his complaints upon that head, that the Emperor had pursued the same course in his war with Prussia. In 1657, the French seized all the property of the subjects of the United Provinces in France without any declaration of war (*m*). In like manner the Portuguese seized all the ships of the Dutch in 1657. The war between the United Provinces and Great Britain, in 1664, was preceded by no declaration. In 1667, Louis 14 invaded the territories of the King of Spain without any declaration, alleging, that such a declaration is not required from them, who are only prosecuting their rights. In 1689, the same prince seized the ships and property of the Dutch without a declaration of war. There is also a remarkable diversity of expression in the two treaties of Utrecht, respecting the reckoning of the time to be allowed for the removal of effects from the enemy's country. By the nineteenth article of the treaty with France, the time is to be reckoned from the actual rupture; but by the corresponding article of the treaty with Spain, it is to be reckoned from the declaration thereof.

These precedents must have escaped the recollection of Valin and Emerigon, when they denounced the hostilities of England against France, in 1755, as acts of piracy, because they were not preceded by a declaration of war (*n*). Since the time of Bynkershoek it has become settled by the practice of Europe, that a war may exist by a declaration that is unilateral only, or without a declaration on either side. Since the peace of Versailles, in 1763, formal declarations of war of any kind seem to have been discontinued; and all the legiti-

(*m*) Bynk. *ibid.*; *Flass.* iii. 201.

(*n*) Val. *Comm.* iii. 6, iii. p. 34; Emer. *Tr. des Ass.* xii. 35, p. 563.

mate and necessary consequences of war flow at once from a state of public hostilities duly recognised and explicitly announced by a domestic manifesto or state paper. In the war between England and France, in 1778, the first public act on the part of the English government was recalling its minister, and that single act was considered by France as a breach of the peace between the two countries. There was no other declaration of war, though each government afterwards published a manifesto in vindication of its claims and conduct. The same may be said of the war which broke out in 1793, and again in 1803; and, indeed, in the war of 1756, though a solemn and formal declaration of war in the ancient style was made in June, 1756, vigorous hostilities had been carried on between England and France for a year preceding. In the war declared by the United States against England, in 1812, hostilities were commenced by the United States as soon as the act of Congress was passed, without waiting to give the English government any notice of their intentions (*o*). It is usual to publish the grounds of war in deductions and manifestoes (*p*).

The primary effect of war is to extinguish all civil intercourse, and to place all the subjects of belligerents in the condition of enemies (*q*). This principle extends not only to natural born subjects, but to all persons domiciled in the enemy's territories (*r*); to all persons who come to reside therein with knowledge of the war (*s*); and to all who, having come to reside before the war, continue their residence after the commencement of hostilities for a longer time than is necessary for their convenient departure (*t*). The determination of national

(*o*) Kent Comm. i. 52.

(*p*) Heinecc. El. ii.; Vatt. iii. §§ 55, 56. 64.

(*q*) Grot. iii. 3, ix.—iii. 6, xii. 2.—iii. 9, iv. 3; Puff. viii. 7, x.; Bynk. Q. J. P. i. iii.; Heinecc. ii. § 201; Vatt. iii. § 70, *et seq.*

(*r*) Grot. iii. 4, viii.—iii. 2, vii. 2.

(*s*) Grot. iii. 4, vi.

(*t*) Grot. iii. 4, vii.

character is subject to distinctions of much nicety, which will be considered in the following chapter.

The corporeal and incorporeal property of the enemy is liable to confiscation (*u*); and an enemy may be attacked wherever he is found, by sea or by land, except in a neutral territory, where he is inviolable, not from any personal privilege which he acquires thereby, but in respect of the rights of the sovereign of the country (*v*). Upon the commencement of war, it is the common practice of nations to lay an embargo upon all property of the enemy in their ports. In the practice of England, the principle of reciprocity prevails. At the breaking out of a war, it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore it if the enemy restores. It is a principle sanctioned by that great foundation of the law of England, Magna Charta itself, which prescribes, that at the commencement of a war enemies' merchants shall be kept and treated as our own merchants are treated in their country (*w*). Property seized under an embargo, is seized provisionally; an act hostile in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the government of whose subjects the property is seized. If that conduct be such as to re-establish the relations of peace, the seizure, though made in the character of a hostile seizure, proves in the event a mere embargo or temporary sequestration. The property is restored, as is usual at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. The seizure is at first equivocal; if the matter in dispute terminate in reconciliation, the seizure is converted into a mere civil embargo so

(*u*) Grot. iii. 2, ii.—iii. 2, v. 2; Bynk. *ibid.* & i. vii.; Heinecc. *Comm.* in Grot. iii. 6, xii.; Vatt. iii. § 197; Hale, P. C. i. 95.

(*v*) Grot. iii. 4, viii. 2.

(*w*) The Santa Cruz, 1 Rob. 63.

terminated. That is the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character on the original seizure. It is declared to be no embargo; it is no longer equivocal, and subject to two interpretations; there is a declaration of the animus with which it was done, that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no compact intervenes for the restitution of such property taken before a formal declaration of hostilities (*x*).

Upon the same ground it was decided by a circuit Court of the United States, that the goods of the enemy found in the country, and all the vessels and cargoes found afloat in its ports at the commencement of hostilities, were liable to confiscation. When the case was brought up on appeal before the supreme Court of the United States, the broad principle was assumed, that war gave the sovereign full right to take the persons and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times has introduced into practice, may more or less affect the exercise of the right, but cannot impair the right itself (*y*). By the 34 Geo. 3, c. 79, the transmission of money due to the enemy was prevented; the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it. The right to confiscate private debts due to an enemy, was laid down by the supreme Court of the United States in accordance with the opinion of Grotius and Bynkershoek, and

(*x*) The *Boedes Lust*, 5 Rob. 233; The *Gertruyda*, 2 Rob. 211.

(*y*) *Brown v. United States*, 8 Cranch, 110; The *Adventurer*, 8 Cranch, 228; Kent Comm. i. 57; *Wolff v. Oxholme*, contra, 6 M. & S. 92.

was held not to be distinguishable from the right to confiscate corporeal property, since they are respectively contracted and acquired under the faith of the same laws (*y*). By the law of England, an alien enemy residing within the realm may secure his goods by purchase of letters patent of denization (*z*). But public debts due to private persons are not confiscable. It will not be easy to find an instance, where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because he cannot be compelled, like other men, in an adverse way, in a Court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that during war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours (*a*). But *ex abundanti cautela* sovereigns may be called upon to declare expressly that such debts shall not be seized as reprisals or in case of war, which is very commonly expressed, when sovereign princes or states borrow money from foreigners (*b*). So a state cannot take advantage of its own wrong; and, therefore, property that is within the territory of a state by its wrongful act, is not confiscable. Upon this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of war with France and since, been restored by sentence of British Courts to the French owners. No such ships or effects were ever attempted to be confiscated as enemy's property here during the war, because, had it not been for the wrong first done, these effects would not have been in the British dominions (*c*).

(*y*) Ibid.

(*z*) Hale, P. C. i. 95.

(*a*) Answer to Pruss. Mem. 1 Coll. Jur. 154.

(*b*) Ibid. 156.

(*c*) Ibid.

The right to seize the persons and effects of enemies within the territory of a belligerent at the breaking out of war, founded upon the common law of nations, has been abrogated or varied by many treaties. By the twenty-second article of the treaty of Breda, between Great Britain and the States General of the United Netherlands, it is agreed, if at any time it happen that the differences now composed between his said Majesty and the said States General should fester and break out again into open war, that then those ships, merchandize, and other kind of moveables of either party, which shall be found to be and remain in the ports and under the command of the adverse party on either side, shall not, for all that, be confiscated or made obnoxious to any inconvenience; but the space of six months shall entirely be allowed to the subjects and inhabitants of either party, that they may have leisure to transport from thence the forementioned things, and anything else that is theirs, whither they shall think fit without any kind of molestation.

By the nineteenth article of the treaty of Utrecht, between Great Britain and France, it is agreed, that in case the dissensions which have been laid asleep shall at any time be renewed between their said royal Majesties or their successors, and break out into open war, the ships, merchandizes, and all the effects, both moveable and immoveable on both sides, which shall be found to be and remain in the ports and in the dominions of the adverse party, shall not be confiscated nor anywise endamaged; but the entire space of six months, to be reckoned from the day of the rupture, shall be allowed to the said subjects of each of their royal Majesties, in which they may sell the aforesaid things, or any part else of their effects, or carry or remove them from thence whither they please without any molestation, and retire from thence themselves.

By the sixth article of the treaty of Utrecht, between Great Britain and Spain, referring to the thirty-sixth article of the treaty of Madrid, it is agreed, that the subjects of their



**Majesties shall not be deprived of the security of navigation and commerce for any little difference that may possibly arise, but that they shall, on the contrary, enjoy all the benefits of peace until war be declared between the two Crowns. And it is further agreed, that if it should happen that war should arise and be declared between their Majesties and their kingdoms, then, according to the contents of the thirty-sixth article of the aforementioned treaty of 1667, after the declaration of such a rupture, the space of six months shall be allowed to the subjects of each party residing in the dominions of the other, in which they shall be permitted to withdraw, with their families, goods, merchandizes, effects, and ships, and to transport them, after having paid the accustomed dues and imposts, either by sea or land to whatsoever place they please; as they shall be also suffered to sell and alienate their moveable and immoveable goods, and freely and without any disturbance to carry away the price of them; nor shall their goods, wealth, merchandizes, or effects, much less their persons, be in the mean time detained or molested by any seizure or arrest. Moreover, the subjects on each side shall in the mean time enjoy and obtain quick and impartial justice, by means of which they may, before the expiration of the six months, recover the goods and effects which they have lent either to the public or to private persons.**

The twelfth article of the treaty of commerce and navigation between Great Britain and Russia, in 1766, provides, that if the peace should come to be broken between the two high contracting parties, persons, ships, and commodities shall not be detained or confiscated; but they shall be allowed at least the space of one year to sell, dispose or carry off their effects, and to retire wherever they please; a stipulation, which is equally to be understood of all those who shall be in the sea and service; and they shall further be permitted, either before their departure, to consign the effects, which they have not as yet disposed of, as well as the debts

that shall be due to them, to such persons as they shall think proper, in order to dispose of them according to their desire, and for their benefit; which debts the debtors shall be obliged to pay, in the same manner as if no such rupture had happened. The same provision is verbally repeated in the twelfth article of the treaty of commerce of St. Petersburg between the same parties in 1797.

The twenty-sixth article of the treaty of amity, commerce, and navigation between Great Britain and the United States of America, provides, that if at any time a rupture should take place between his Majesty and the United States, the merchants and others of each of the two nations residing in the dominions of the other shall have the privilege of remaining and continuing their trade, so long as they shall behave peaceably, and commit no offence against the laws; and in case their conduct should render them suspected, and the respective governments should think proper to order them to remove; the term of twelve months from the publication of the order shall be allowed them for that purpose to remove with their families, effects and property; but this favour shall not be extended to those who act contrary to the established laws; and for greater certainty it is declared that such rupture shall not be deemed to exist, while negotiations for accommodating differences shall be depending, nor until the respective ambassadors or ministers, if such there shall be, shall be recalled or sent home on account of such differences, and not on account of personal misconduct; according to the nature and degrees of which both parties retain their rights either to request the recall or immediately to send home the ambassador or minister of the other; and that without prejudice to their mutual friendship and good understanding. But by the twenty-eighth article of the same treaty, the preceding article is limited in duration to twelve years from the date of the exchange of ratifications, which took place on the 17th of October, 1795, and it has not since been renewed.

The illegality of all trade between the subjects of belligerents is an immediate consequence of the principle, that war extinguishes all civil intercourse (*d*). There is no maxim better or more firmly established in the maritime law of this country than this; that no subject of the King can trade directly with the public enemy, but under a license authorizing him so to do; and that if he does presume to trade otherwise, his property so employed is liable to confiscation (*e*). The principle affects persons domiciled in a country, as much as native subjects, for it is illegal in a person owing an allegiance, though temporary, to trade with the public enemy, such a person is in the actual receipt of the benefit of protection for his person and commerce from the arms and laws of the country in which he is domiciled, and he must take his situation with all its duties, and amongst those duties, the duty of not trading with the enemies of the country (*f*). This is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law. *Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita ipsæ indictiones bellorum satis declarant.* He proceeds to observe, that the interests of trade and the necessity of procuring certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, prout e re suâ subditorumque suorum esse censent principes. But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war quoad hoc. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis.* It appears from these passages to have been the law of Holland. Valin states it to have been the law of

(*d*) Bynk. Q. J. P. i. iii.; Val. Comm. iii. 6, iii.; Emer. Tr. d'Ass. iv. 9.

(*e*) The *Odin*, 1 Rob. 250; The *Cosmopolite*, 4 Rob. 10.

(*f*) The *Indian Chief*, 3 Rob. 19. 22.

France, whether the trade was attempted to be carried on in national or in neutral vessels. It will appear, from the case of the *Fortuna*, which will be noticed hereafter, to have been the law of Spain, and it may, without rashness, be affirmed to have been a general principle of law in most of the countries of Europe. By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part by permitting, when he sees proper, that commercial intercourse, which is a partial suspension of war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions on their own notions of commerce and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the state. It is for the state alone on more enlarged views of policy, and of all the circumstances, that may be connected with such an intercourse, to determine whether it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist upon any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on a species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled in such a situation of the two countries to carry on his trade between them (if necessary) under the eye and controul of the government charged with the care of the public safety? Another principle of law of a less politic nature, but equally general in its reception and direct in its application, forbids this communication as fundamentally inconsistent with the relation at that

time existing between the two countries; and that is the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of an alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy, such as his coming under a flag of truce or cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*; but otherwise he is totally *ex-lex*. Even in the case of ransoms, which were contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned • hostage in the Courts of his own country for the recovery of his freedom. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal disability to contract? To such transactions it gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter seven, where he lays down that the legality of commerce and the mutual use of Courts of justice are inseparable. He says that cases of commerce are undistinguishable from cases of any other species in this respect. *Si hosti semel permittas actiones exercere difficile est distinguere ex quâ causâ oriuntur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.* Upon these and similar

grounds it has been the established rule of law, confirmed by the judgment of the supreme Court, that a trading with the enemy, except under a royal license, subjects the property to confiscation. This rule has been rigidly enforced where acts of Parliament have, on different occasions, been made to relax the navigation law and other revenue acts; where the government has authorized, under the sanction of an act of Parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; it has been enforced where strong claims, not merely of convenience, but almost of necessity, excused it on behalf of the individual; it has been enforced where cargoes have been laden before the war, but where parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; it has been enforced, not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply mutually to each other's subjects (*g*). The same rule has been enforced, where the intention of the parties committing the act was perfectly innocent, as when they had been misled by the information received from commissioners of customs, and by a proclamation of the Lord Lieutenant of Ireland. The fact of an actual contravention of law is one, which no innocence of intention can do away, for ignorance of the law is not a plea that can be admitted in any Court (*h*). The same principle prevailed where an illegal trade had been carried on under a bonâ fide belief of its legality, sanctioned by the Governor General of India (*i*). It was held, that whatever doubt might be enter-

(*g*) *The Hoop*, 1 Rob. 196; *Griswold v. Wadington*, 16 Johnson, U. S. 438; *Scholefield v. Eichelberger*, 7 Peter, U. S. 586; *Kent Comm.* i. 68.

(*h*) *The Hoop*, 1 Rob. 196; *The Charlotte*, 1 Dod. 387.

(*i*) *The Angelique*, 3 Rob. Appen. 9.

tained, whether the East India Company might not, in wars in India originating with them under the power of their charter, relax the operation of war, so far as to license the trade of individuals with such an enemy; they could unquestionably have no such power, in respect to a trade carried on with a general and public enemy of the Crown of Great Britain. The same course of decisions which has established, that property of a British subject taken trading with the enemy is forfeited, has also decided, that it is forfeited as prize. The ground of forfeiture is, that it is taken adhering to the enemy, and, therefore, the proprietor is *pro hac vice* to be considered as an enemy (*j*). Thus, where a cargo consisted of goods the property of British merchants trading to Malaga, which had been left in warehouses there to await a favourable opportunity of sending them home; it was condemned (*k*). So where perishable goods were consigned by a British owner to a merchant in an enemy's port, that they might not perish in the hands of the owner (*l*). So Bourdeaux wines, the property of Irish merchants, shipped at Bourdeaux during the war were condemned, although the commissioners of excise in Ireland had constantly permitted the trade during the war, and an Irish act of Parliament had imposed an additional duty during the same period; and it was urged that it could not be imagined, that the Irish Legislature would be inattentive to public affairs, or propose to draw a revenue from a trade prohibited and illegal (*m*). So a return cargo, though the produce of goods sent to the enemy's country before the war, was condemned (*n*). The share of a partner is confiscable in a transaction in which he could not lawfully be engaged as a sole trader, and the rule applies even where he is an inactive

(*j*) *The Nelly*, 1 Rob. 219, n.

(*k*) *Jouffrow Louisa Margaretha*, cited 1 Rob. 203.

(*l*) *St. Louis*, cited *ibid.* 204.

(*m*) *Compte de Worowzoff*, cited *ibid.* 205, a.

(*n*) *The Lady Jane*, *ibid.* 202; *The William*, *ibid.* 214.

or sleeping partner (*o*). Where an act of Parliament took off the restraints, which were imposed by the navigation laws upon the foreign trade of the country, it was held in no degree to relieve the parties from the disability to carry on commerce with the enemy (*p*). So a British cargo of provisions, going on board a neutral vessel to British plantations in Granada, after it had fallen into the enemy's possession, was confiscated, although an act of Parliament at that time allowed the exportation of goods of the growth, produce or manufacture of the island on board neutral vessels bound to neutral ports, and the provisions were sent out to bring back a return cargo of such goods (*q*). Nor will any exemption be gained by sending goods to the enemy through a neutral country. The interposition of a prior port makes no difference; all trade with the enemy is illegal, and the circumstance, that the goods are to go first to a neutral port will not make it lawful. The trade is still liable to the same abuse and to the same political danger. During a war, it is not competent to a subject to send goods to a neutral port with a view of sending them forward on his own account to an enemy's port, consigned by him to persons there as in the course of ordinary commerce (*r*).

In the case of the *Fortuna*, a cargo, the property of British merchants carrying on trade at Barcelona, was shipped on board a neutral vessel bound to Calais. On her voyage the ship was taken by a Spanish frigate, and released by a sentence in these terms; "that considering that the vessel is under neutral colours; that the cargo does not consist of contraband goods; that the concerned do not appear other than merchants resident in Spain; that the war was not declared against France, neither when she was laden, nor when she

(*o*) The *Franklin*, 6 Rob. 127.

(*p*) The *Charlotta*, 1 Dod. 387.

(*q*) *Bella Guidita*, cited 1 Rob. 207.

(*r*) The *Jonge Pieter*, 4 Rob. 83.



was detained; they did command the said brig to be set at liberty." For the captors, it was contended, that the ship was liable to confiscation, because she sailed from Spain for Calais many months subsequent to the commencement of hostilities by the French against this country, and against Spain; and because it was incumbent on the proprietors to have prevented the sailing of this ship from Spain for Calais, or to have shewn that every endeavour had been used for that purpose. The sentence of the High Court of Admiralty condemning the cargo was affirmed (*s*). Where a cargo, the property of British and Dutch owners, was laden in a neutral ship, before the declaration of war by France against England and Holland on the 1st of February, but the ship did not sail till the 9th; the sentence of the Court of Admiralty condemning the whole cargo was affirmed (*t*). The share of the Dutch owner was condemned, on the ground, that during a conjoint war no subject of one belligerent can trade with the enemy without being liable to a forfeiture of his property engaged in such trade in the Courts of the ally (*u*). Since the world has grown more commercial a practice has crept in of admitting particular relaxations; and if one state only is at war, no injury is committed to any other state. It is of no importance to any other state how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise, when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do anything to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that trade and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign com-

(*s*) *The Fortuna*, cited 1 Rob. 211.

(*t*) *The Eenigheid*, cited 1 Rob. 210.

(*u*) *The Naylor*, 4 Rob. 251.

merce, which may be very injurious to the common cause and the interests of its ally. It should seem, therefore, that it is not enough to say, that one state has allowed this practice to its own subjects; it should appear, that it was at least desirable that it could be shewn, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state. Hence, when one confederate had given express liberty to his subjects to freight vessels for the enemy's ports, which had been assented to by the other confederate in respect of innocent articles: it was held that such license and assent did not extend to the exemption of naval stores (v).

To subject a party to the penalty of trading with the enemy, there must be an illegal act as well as an illegal intention. Thus, where a vessel sailed to a Dutch colony after an order issued for the detention of Dutch property, but before any declaration of hostilities, and arrived after the colony had surrendered to the British forces; this was held not to be a trading with the enemy. The order for the detention of Dutch property was an equivocal act, which might terminate amicably, and could not be taken as fixing upon the party an intention of trading with a declared enemy. There must be an act of trading as well as the intention. There must be a legal as well as a moral offence. If a man fires a gun at sea, intending to kill an Englishman, which would be a legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favour; the criminal act intended has not been committed, and the man is innocent of the legal offence. So if the intent was to trade with an enemy, but at the time of carrying the design into effect, the person is become not an enemy; here the intention wants the *corpus delicti*. Where a country is known to be

(v) *The Neptunus*, 6 Rob. 403.

hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but when the voyage is undertaken without that knowledge, the subsequent event of hostilities will have no such effect (*w*). The consent of the sovereign, which is necessary to legalize commercial intercourse with the enemy, may be signified in a variety of ways; by a license granted to the individual for the special occasion, by an order in council, by proclamation, or under the authority of an act of Parliament, to which the Crown is necessarily a party (*x*). The special facts of one very peculiar case were held of themselves to be equivalent to a license. Wines had been purchased by the British consul at Barcelona under a government contract for the supply of the British fleet. He had not acted as a merchant, nor made any purchases, but for this particular purpose. The wines were secreted upon the breaking out of the war, and having been afterwards mixed with other wine to render them saleable, they were shipped on a voyage to a neutral port. It was held that the circumstances of this case amounted to a virtual license; that on the ground of public utility it was not too much to hold out this encouragement to persons engaged in contracts of this sort; that it would be a considerable discouragement to persons in such situations at a distance from home and employed in the public service, if they were to know that in the case of hostilities intervening they would be left to get off their stores as well as they could, with a danger of capture on every side (*y*).

There is much conflict among the text writers with respect to the means of destruction, that are lawful in war. Grotius holds poisoning to be unlawful and contrary to the usage of nations; and distinguishes between assassination and a

(*w*) The *Abby*, 5 Rob. 251; and see *Lisette*, 6 Rob. 387; The *Trende Sostre*, 6 Rob. 390, n.

(*x*) The *Charlotta*, 1 Dod. 390.

(*y*) The *Madonna delle Gracie*, 4 Rob. 195.

desperate enterprise (z). Bynkershoek holds poisoning and assassination to be unhandsome, but not unlawful; and that, on principle, an enemy is to be regarded as a condemned criminal. Heineccius agrees with him, which is more remarkable, because Heineccius lays down principles from which the opposite conclusion necessarily follows (a). He holds, that since war is carried on in prosecution of a right, all things are lawful towards an enemy, without which that right can not be obtained, and since that can not be obtained, until the enemy has been subdued to the abandonment of his hostile intentions, or deprived of the means of prosecuting them; every kind of force and fraud is lawful, which is necessary for that purpose. This seems to be in accordance with the dictum of Lord Mansfield, that no cruelties are permitted by the law of nations, that are not necessary to secure a conquest (b). But Heineccius admits, that poisoning and assassination are contrary to the usage of civilized states, and this admission is conclusive against his opinion. On mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner in which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and belligerents are bound to confine themselves to those modes, which the common practice of mankind has employed, and to relinquish those, which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purpose (c). Every kind of stratagem, such as disguising men and ships, spreading false news and the like, is lawful (d). To sail and chase under false colours

(z) Grot. iii. 4, xv. xvi. xviii.; Puff. viii. 6, xvi.; Vatt. iii. §§ 155, 156, 157.

(a) Bynk. Q. J. P. i. 1; Heinecc. El. ii. § 201.

(b) *Corun v. Blackburne*, 2 Doug. 644.

(c) *The Flad Oyen*, 1 Rob. 140.

(d) Grot. iii. 1, viii. 4 & 5.—iii. 1, xiii. 2.—iii. 5, iv; Puff. viii. 6, vi.; Vatt. iii. §§ 177, 178.

may be an allowable stratagem of war, but firing under false colours is what the maritime law of England does not permit, for it may be attended with very unjust consequences. It may occasion the loss of lives of persons, who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection (*e*). Nor is anything lawful that is done in violation of any convention, whether expressed by words or by symbols known in the usage of war. Such conventions suspend the state of war within the limits of their operation; and any violation of them, such as acts of hostility committed during a truce or under cover of a flag of truce, or against persons protected by a flag of truce or pass or safe conduct, would not be acts of stratagem but of perfidy (*f*). The ancient practice of putting prisoners to death appears, according to Bynkershoek, to have been revived by the Dutch in the case of Spanish prisoners, who were not ransomed. They also decreed the punishment of death against enemies, who should make a descent upon the coast for the purpose of plunder, or should approach the coast within a certain distance; and Bynkershoek defends this decree by reference to the ancient practice. He admits, however, that the practice of putting prisoners to death is obsolete, and concurs with Grotius in expressing a generous indignation against the doctrine, that it may be exercised against a garrison, upon the ground of their having made an obstinate defence (*g*). He also admits, that the enslaving of prisoners would be a violation of the modern law of nations, except by way of retaliation, which was practised by the Dutch in the case of prisoners from the Barbary states, whom they sold to Spaniards (*h*). By the primitive law of nations all captives were slaves (*i*).

(*e*) The Peacock, 4 Rob. 187.

(*f*) Grot. iii. 24, iii. 5; Puff. viii. 6, vi.; Bynk. Q. J. P. i. 1; Heinecc. El. ii. § 202; Vatt. iii. § 178.

(*g*) Grot. iii. 4, xiii.—iii. xi. xvi.; Bynk. Q. J. P. i. iii.

(*h*) Bynk. Q. J. P. i. iii.; Grot. iii. 21, xxv. xxviii.

(*i*) Grot. iii. 7, i. —iii. 7. v. 1.

But Christian nations were induced by religious motives to abstain from enslaving or selling into slavery those of their own religion; and the same feeling prevailed amongst Mahometans (*k*). The practice of ransom succeeded to slavery; and the mutual exchange of prisoners of equal degree has been substituted for ransom, with safe custody until the exchange is effected (*l*). To apply to enemies modes of restraint, that are unnecessary, and at the same time convey personal indignity and personal suffering is highly dishonourable. There may be cases in which such restraint may be necessary, and therefore justifiable. But the necessity must be urgent and evident (*m*). But spies are liable to be put to death (*n*). Engagements made by prisoners not to bear arms against the enemy, or not to attempt to escape, are valid, and their sovereigns are bound to enforce them (*o*). Grotius suggested many temperaments to the exercise of the rights of war, which have been adopted in the modern usage of nations. He prohibits the putting to death of persons incapable of bearing arms, as women and children, and persons of peaceful professions, or those who are incapable of further resistance, as those who have surrendered (*p*). In like manner he prohibits all violence to women, the wanton ravage of a country, the wanton destruction of buildings or public monuments (*q*). But he does not disapprove of contributions levied by way of ransom (*r*).

The commanders of forces have an incidental authority to conclude conventions binding upon their sovereigns, concerning the forces under their command; such as capitula-

(*k*) Grot. iii. 7, ix.

(*l*) Bynk. *ibid.*; Grot. iii. 14, ix.

(*m*) The St. Juan, 5 Rob. 39.

(*n*) Grot. iii. 4, xviii. 3.; Vatt. iii. § 179.

(*o*) Grot. iii. 23, vi. vii. viii. x.; Vatt. iii. § 151.

(*p*) Grot. iii. xi. 9, 10, 13.; Vatt. iii. § 145, *et seq.*

(*q*) Grot. iii. 4, xix.—iii. xii. 1, 2, 5, 6, 7; Vatt. iii. § 168.

(*r*) Grot. iii. 13, iv.; Vatt. iii. § 165.

tions, truces, safe conducts, and the like (*s*). Nothing can be more sacred than capitulations. They are to be held most inviolate. It is scarcely possible to conceive any terms however incommodious, that ought not to be faithfully observed in the execution of such contracts (*t*). A truce is a convention, by which hostilities are suspended for a limited period (*u*). In construing the language of such conventions the same rules are applicable as in the construction of treaties. Where the language is ambiguous, that construction is to be preferred, which extends the benefit of the truce, because a truce is a matter of a favourable nature (*v*). Grotius holds, that where a truce runs from such a day to such a day, the day from which it runs, is excluded; Puffendorf and Heineccius hold the contrary; and considering the nature of the subject-matter, theirs appears to be the better opinion, and upon this ground Grotius himself holds that the latter day is included (*w*). To avoid ambiguities it is sometimes agreed, that a certain time before the commencement of hostilities the truce shall be denounced, in which case it continues after the denunciation, until the limited period has elapsed. The right of capture, and consequently the right of postliminium, which only arises upon recapture, is suspended during a truce (*x*). It is lawful during a truce, unless expressly prohibited by the terms thereof, to withdraw forces or to collect reinforcements (*y*). But it is not lawful to advance, or to occupy unguarded positions, or to receive deserters, for these are acts of hostility (*z*). The obligation of a truce ceases, if it is violated by the other party, for the obligation on either side is conditional, and de-

(*s*) Grot. iii. 22, ii.—iii. 22, iv.; Puff. viii. 7, xiii.; Vatt. iii. § 237.

(*t*) La Gloire, 5 Rob. 197; Vatt. iii. § 261.

(*u*) Grot. iii. 21, i.; Puff. viii. 7, iii.

(*v*) Grot. iii. 21, iv.; Vatt. iii. § 244.

(*w*) Grot. iii. 21, iv.; Puff. viii. 7, viii.; Heinecc. El. ii. § 210, (*u*).

(*x*) Grot. iii. 21, vi.; Vatt. iii. § 256.

(*y*) Grot. *ibid*.

(*z*) Grot. iii. 21, viii.; Puff. viii. 7, ix.

pend upon its faithful observance by the other contracting party (*a*). Where a penalty is annexed to a violation of a truce, an option is given to exact the penalty or to renew hostilities; but when the penalty is demanded and paid, the option is determined, and the truce continues (*b*). A truce is not violated by unauthorized acts, unless they are ratified by refusal of satisfaction (*c*). A truce binds the principals from its completion; but it is not binding upon other persons, until it has been published, and if it be violated before publication, the parties violating it are not criminally responsible; but the contracting party, whose duty it was to publish it, is bound to make compensation to the party injured (*d*).

Passports or safe conducts are to be construed according to the grammatical sense of the words in their natural meaning, where a deviation is not requisite in order to avoid an absurdity (*e*). Where a safe conduct is granted to a class of persons, it includes all persons belonging to that class of whatever degree: a passport to the clergy would include bishops; a passport to military persons would include commanders in chief, sailors, and all persons subject to martial law (*f*). Where license is granted to go to such a place, it implies license to return, wherever that is the purpose for which the license is granted; for otherwise the license would be absurd and inoperative. Where it is granted to leave a place, it implies protection during the journey (*g*). A passport or safe conduct to a particular person is a personal privilege and cannot be transferred; but it extends to necessary attendants and equipage, the necessity of which is to be determined by

(*a*) Grot. iii. 21, xi.

(*b*) Grot. iii. 21, xii.; Puff. viii. 7, xi.

(*c*) Grot. iii. 21, xiii.

(*d*) Grot. iii. 21, v.

(*e*) Grot. iii. 21, xiv.

(*f*) Grot. iii. 21, xv.

(*g*) Grot. iii. 21, xvi.



the rank of the person to whom the passport is granted (*h*); but it does not include the wife or son of him to whom it is personally granted (*i*). A safe conduct is not determined by the death of the person granting it, nor is it confined to the territories of the prince by whom or by whose delegated authority it is granted, but is co-extensive with his exercise of the right of war (*k*).

The principal use of safe conducts, in modern times, is for the protection of cartel ships employed for the exchange of prisoners of war. The practice of exchanging prisoners of war in this manner is of no ancient introduction among the states of Europe; it succeeded to the elder practice of ransoming, which succeeded to the still more ancient practice of killing or carrying them into captivity. It is a practice which, as far as the writings of Grotius seem to indicate, was not of very familiar or general use in his time, though, perhaps, not altogether unknown. It is, however, of a nature highly deserving of very favorable consideration upon the same principles as are all other *commercium belli*, by which the violence of war may be allayed so far as is consistent with its purposes, and by which something of a pacific intercourse may be kept up, which in time may lead to an adjustment of differences and end ultimately in peace. At the same time, it is very proper that it should be conducted with very delicate honour on both sides, so as to leave no ground of suspicion, that a practice introduced for the common benefit of mankind, should be made a stratagem, or become liable to fraudulent abuse. Ships are to be protected in this office *ad eundem et redeundum*, both in carrying prisoners and in returning from that service. A ship going as a cartel ship, is not protected by mere intention on her way from one port to another of her own country for the purpose of taking upon herself that

(*h*) Grot. iii. 21, xvi.; Vatt. iii. § 267.

(*i*) Grot. iii. 21, xvii. xviii.

(*k*) Grot. iii. 21, xix. xxii.; Vatt. iii. § 268.

character when she arrives at the latter port. In some cases a necessity for sending ships for such a purpose may occur, but it is usual in such cases, and it is proper to apply to the commissary of prisoners residing in the country of the enemy and to obtain a pass from him. From this practice alone, we may infer, that it is not the employment that is held to carry a necessary protection in such cases, but that the security is derived from the special safe conduct, which would be unnecessary, if the mere service were sufficient. It is a precaution most reasonable, that such a safe conduct should be obtained. Yet where ships were going in perfect good faith on cartel service, and had ventured out to sea under a reliance of being protected by the nature of the service, it was held that, though it must be considered a rash step to venture without a safe conduct, it would be too strict to hold them liable to the penalty of confiscation, and they were restored (*1*). So, where a ship was taken sailing under a flag of truce, that is, under the English and French colours joined together, without any safe conduct, but acting *bonâ fide* as a cartel ship. It appeared that the *St. Lucie* was taken by assault without any capitulation, and that after surrender, the English general had granted permission to the French general to proceed to France on parole, not to serve again till exchanged. It was not therefore a contract of mutual benefit, but a matter of indulgence to be favourably considered indeed as the act of a general officer, who may be supposed to have been the best judge of the propriety of the measure at the time; but something, which does not bind his country precisely to the same extent as a capitulation of war, by which return of advantage is stipulated and obtained for his country. It also appeared, that the second in command had given permission to other persons to go to Martinique and afterwards to France as they might find most convenient. These gentlemen went to Mar-

(1) *The Daifjee*, 3 Rob. 139.

tinique, and there this vessel was taken up as a cartel ship by virtue of this permission, though not strictly a cartel ship. It was certified that this transaction did not exceed the intention of the British officer, under whose permission the prisoners were allowed to return to France; and it was held, that if he had exceeded his powers or made an improvident concession, that would not supersede the obligation of the court to support the good faith of the agreement on which the other party had acted with confidence, and restitution was decreed (*m*). The privileges and immunities of a cartel ship are of a very sacred nature and are to be received with very great respect, inasmuch as they tend very beneficially to mitigate the miseries of war and to facilitate the return of peace by the removal of those obstructions which put a stop to the intercourse of nations. The actual existence of war is not necessary to give effect to contracts of cartel; it is sufficient if they are entered into prospectively and in expectation of an approaching war, because the occasions for them may just as naturally arise from a view of approaching events. Parties may contract to provide against the consequences of hostilities, which they may foresee. That the Crown has the power of granting the protection of cartel is undoubted. Though he may have given away the interest in all captures to the captors, his Majesty may still grant such particular exemptions, as in his wisdom he may deem expedient. And when a cartel appears to have been employed in the public service and for purposes of national utility, that circumstance alone will entitle it to be considered as an engagement sanctioned by the public services of the state. Authority delegated by the Crown may be taken as emanating from the Crown. It is the practice for general orders and instructions to be sent out to all persons executing the functions of executive government abroad; but as it would be impossible to provide for all

the special exigencies that may occur, such persons must often be left under the necessity of acting on their own judgment and discretion ; and what is done by them under such circumstances in the execution of their public duty may fairly be considered as done under the authority of the Crown, if not renounced by the Crown, in subsequent actions or declarations. Thus, where protection in contemplation of hostilities had been granted to a Dutch ship, employed to remove British troops from Amboyna in pursuance of the treaty of Amiens, by the British commander in that place ; and the protection had been confirmed by the governor of Madras after the commencement of hostilities, the vessel was held to be protected as a cartel ship ; and the protection was held to extend to a cargo, which the vessel took in at Madras, as it was stipulated, that she should be at liberty to do to the amount of freight, free from duties(*n*). When an English ship went into the Cape of Good Hope in ignorance of hostilities, and was there taken, and her crew imprisoned ; and some of the prisoners being put on board an English cartel ship with their own consent to be conveyed to England, to be there exchanged for Dutch prisoners, seized the boat of the cartel ship, attacked their vessel and carried her off : it was held, that the recapture was not such as would revert the interest of the original proprietors, or entitle the recaptors to salvage. Such a recapture is not of such a nature as can be deemed a legal capture ; for an act, which is itself illegal, can convey no right. The surprising and retaking, described by the act of Parliament, must be such a surprising and retaking as the law would acknowledge and justify, and not such a surprising and retaking as being in itself piratical, must be deemed a nullity as to any legal effect. Here was a surprising and retaking, that had been effected through a violation of contract, by persons pretending to act upon

(*n*) *The Carolina*, 6 Rob. 336.

rights, which they had parted with, as well by their own engagement as by the nature of the situation in which they were placed. Such an act is essentially invalid, and can have no legal consequence attached to it, either for the benefit of those persons themselves, or for the benefit of others, who may claim through them. The Court held the Dutch government to be aggrieved, as undoubtedly an enemy may be aggrieved by an undue exercise of the rights of war; and, considering the interest which the Crown has in preserving the sanctity of good faith in all public relations to foreign states, it decreed the property to be delivered to his Majesty, to be by him disposed of as his sense of justice towards the injured government might direct (o). Cartel ships are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy or to their own country; both countries are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse. All trade, therefore, must be held to be prohibited, and it is not without the consent of both governments, that vessels engaged in that service can be permitted to take in any goods whatever. The conduct of ships of this description cannot be too narrowly watched; the service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. It is not a question of gain, but one on which depends the recovery of the liberty of individuals, who may happen to have become prisoners of war; it is, therefore, a species of navigation, which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules, which have been built upon it, since, if such a mode of intercourse is broken off, it cannot but

(o) *The Mary*, 5 Rob. 200.

be followed by consequences extremely calamitous to individuals of both countries. There is no way in which this purity of conduct can be maintained, but by considering the owner as answerable for the due execution of the service on which his vessel is employed. It is the very last description of case, in which the responsibility of the owner should be relaxed. Hence, where goods were taken on board a cartel ship not clandestinely, but in such quantities as to call for the remonstrance of the officers of the ship, it was held, that that was not such petty malversation as should be imputable to the master only, and the ship was condemned (*p*). On the same grounds goods taken on board a cartel ship are liable to confiscation (*q*). The privilege of cartel being confined to the intercourse of hostile states can have place between belligerents only, and is not applicable to the transactions of a neutral state acting for its own purposes, without reference to the existence of a war with any other country (*r*).

Title is acquired *jure belli* to all property taken from the enemy; but it is not complete until the things seized are carried into a place of safety; *infra præsidia* (*s*). Property captured from an enemy, who was entitled to it *jure belli*, can not be claimed by the former owner (*t*). Such title has reference only to questions between neutrals and the original owners of property; as to the enemy he has the right of recapture, until he has renounced it by a treaty of peace (*u*). But no title is acquired to neutral property in the towns or territories of the enemy, though it is always presumed to be enemy's property, until the contrary is proved (*v*). All booty is acquired to the

(*p*) The Venus, 4 Rob. 335.

(*q*) The Caroline, 6 Rob. 336.

(*r*) The Rose in Bloom, 1 Dod. 60.

(*s*) Grot. iii. 6, ii.—iii. 6, iii.—iii. 9, xvi.; Bynk. Q. J. P. i. iv.

(*t*) Grot. iii. 6, vii.

(*u*) Puff. viii. 6, xviii.

(*v*) Grot. iii. 6, v. vi.—iii. 6, xxvi. i.

state, and to those who claim under it (*w*). Plunder or booty, in a mere continental war, without the presence or intervention of any ships or their crews, has never been important enough to give rise to any question about it. There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom. It is often given to the soldiers on the spot, or wrongfully taken by them contrary to military discipline. If there is any dispute, it is regulated by the commander-in-chief (*x*).

(*w*) Grot. iii. 6, x., and Barbey. in not. in loc, ibid. xxi. xxii.; Puff. viii. 6, xviii.

(*x*) *Le Caux v. Eden*, 2 Doug. 614, n.

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## CHAPTER II.

## OF NATIONAL CHARACTER.

NATIONAL character may be considered in respect of, first, Personal domicil, or national character acquired by residence. Secondly, Commercial domicil or national character acquired by trade. Thirdly, The national character of ships. Fourthly, The national character of goods. Fifthly, The national character of the produce of landed property. Sixthly, The national character of countries.

First, National character by residence, or personal domicil is a matter depending upon facts and intention (*a*). The domicil of a person is, where he has taken up his abode with the intention of permanent residence (*b*). In the language of the Roman lawyers it is, *ubi quis larem ac fortunarum summam constituit, unde non sit discessurus, si nil avocet; unde quum profectus sit peregrinari videtur*. Those who are domiciled in a country acquire its national character, no less than native subjects (*c*). They are entitled to carry on trade to the same extent as native subjects, provided it be not inconsistent with their native allegiance (*d*). But this disability is personal; where a contract illegal in the hands of a subject is transferred to foreigners, the illegality does not

(*a*) Pothier, xvi. 4.

(*b*) Grot. iii. 2, vii. 2.—iii. 4, viii.—iii. 4, vii.

(*c*) Grot. *ibid*.

(*d*) The Emanuel, 1 Rob. 302; The Neptunus, 6 Rob. 408; The Ann, 1 Dod. 223; The Etrusco, 4 Rob. 262, (*n*); The Dos Hermanos, 2 Wheaton, 76; Kent Comm. i. 72.



run with the contract, nor affect them as a contract made or executed in breach of allegiance (*e*).

Where a shipment from the enemy's country was made on account of a house of trade in a neutral country, consisting of partners domiciled, some in a neutral and some in the enemy's country. The shares of the former were restored, and the shares of the latter were condemned (*f*). As to captors, partners are presumed to take in equal proportions, unless on the face of the original papers a different apportionment appears. The reason of this rule is manifest, for were it otherwise, as the evidence to change the proportions must come from the enemy, whose interest it must be to diminish his own share as much as possible, the Court would, by admitting further proof, be exposed to every species of belligerent fraud (*g*). Mere intention to settle, or a mere nominal residence, will not constitute domicile; for that purpose there must be residence taken up honestly, with a bonâ fide intention of making it the place of habitation (*h*). Residence or domicile is a question of considerable difficulty, depending upon a great variety of circumstances, hardly capable of being defined by general precise rules. The active spirit of commerce, now abroad in the world, still farther increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time, and by that sort of extended circulation, by which the same transaction communicates with different countries; in which the same trading adventures have their origin perhaps in America, travel to France, from France to England, from England back to America again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction. In deciding such cases

(*e*) *The Anna Catharina*, 4 Rob. 112.

(*f*) *San Jose Indiano*, 2 Gallison, 268. 293, *et seq.*

(*g*) *Ibid.* 303.

(*h*) *The Endraught*, 1 Rob. 24; *The Falcon*, 6 Rob. 198.

the necessary freedom of commerce imposes the duty of a particular attention and delicacy, and strict principle of law must not be pressed too eagerly against it. The particular situation of merchants in America seems still more particularly to entitle them to some favourable distinctions. They have not the same open and ready and constant correspondence with individuals of the several nations of Europe, that these persons have with each other; they are on that account more liable to have their mercantile confidence in Europe abused, and, therefore, to have more frequent calls for a personal attendance upon their own concerns; and it is to be expected, that when the necessity of their affairs calls them across the Atlantic, they should make rather a longer stay in the country where they are called, than foreign merchants, who step from a neighbouring country in Europe, to which every day offers a convenient opportunity of return.

One of the few principles that can be laid down generally is, that time is the grand ingredient in constituting domicil. Hardly enough is attributed to its effect. In most cases it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time, which such a purpose may or shall occupy; for if the purpose be of such a nature as may probably, or does actually detain a person for a great length of time, a general residence may grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit, it may happen, that it may last as long as himself; some suits are famous in our history for having outlived generations of suitors. Against such a long residence the plea of an original special purpose could not be averred; it must be inferred from such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him

the character of the country where he resided. Suppose a man comes into a country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside a good part of the war, contributing by payment of taxes and other means to the strength of the country, he could not plead his special purpose with any effect against the rights of hostilities (1). If he could, there would be no sufficient guard against the fraud and abuses of masked, original, and sole purposes of a long continued residence. There is a time, which will estop such a plea; no rule can fix the time *à priori*, but such a time there must be.

In proof of the efficacy of mere time it is not impertinent to remark, that the same quantity of business, which would not fix a domicile in a certain space of time, would, nevertheless, have that effect, if distributed over a larger space of time. Suppose an American comes to Europe with six contemporary cargoes, of which he has the present care and management, meaning to return to America immediately, that would be a different case from that of the same American coming to any particular country of Europe with one cargo and fixing himself there to receive five remaining cargoes, one in each year successively. Time is a great agent in the matter, it is to be taken in a compound ratio of the time and the occupation with a great preponderance on the article of time; be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not fix a domicile.

Where an American resided for a year in France for mercantile purposes, and then returned to America, and afterwards came back to France and resided there for four years, it was held that he was domiciled in France; and that supposing him to have returned for the purpose of collecting

(1) Cf. Grot. iii. 4, vi. vii.; Heinecc. Comm. in loc.

debts, it would be difficult to say, that the original purpose could privilege a residence of four years (*k*). But mere recency of arrival is immaterial where an intention of permanent residence is proved. An English merchant had arrived at St. Eustatius, only a day or two before the arrival of the British forces, to which the island surrendered; but it was proved that he had gone to establish himself there, and his property was condemned (*l*). Where a neutral resorts to an enemy's country to recover debts, and makes exportations therefrom merely for the purpose of withdrawing his funds, although such pretences are at all times to be watched with considerable jealousy, yet when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accident of war may have lodged in a belligerent country, cases of this description are entitled to be treated with some indulgence. Thus, where a neutral continued in the enemy's country from February to July, and succeeded in the recovery of some part of his money, which having no opportunity of remitting it directly, he invested in the purchase of several prize vessels, which he sent to England, some in ballast and some loaded with provisions. Two of the latter description were captured, brought to adjudication and restored (*m*).

Domicil is presumed to be where a party resides. The presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it. The presumption is not rebutted by the residence of his wife and family in his own country (*n*). If a person goes into another country and resides there and engages in trade, he is by the law of nations to be considered as a merchant of that

(*k*) The *Harmony*, 2 Rob. 322.

(*l*) *Whitehill's case*, cited *Diana*, 5 Rob. 60; *The Boedes Lust*, 5 Rob. 233.

(*m*) *The Dree Gebroeders*, 4 Rob. 232.

(*n*) *The Ann*, 1 Dod. 221; *The Bernon*, 1 Rob. 103.

country (*o*). A British born subject, resident in the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland, being then at war with England, but not with Portugal, not impeachable as illegal trade (*p*).

The character of consul does not affect the national character of the person invested with that title. It has been decided in various instances that the national character of a consul is not affected by the title he bears, but it is to be judged of simply as the character of other merchants by residence and various other circumstances, that constitute the character of other persons (*q*). It is fully established, that the character of consul does not protect that of merchant united in the same person. It was so decided on solemn argument by the Lords in the cases of the Portuguese consul in Holland and the Russian consul at Flushing. These cases were again brought forward in the case of the American consul at Bourdeaux, in whose behalf a distinction was set up in favour of American consuls as being persons not usually appointed as the consuls of other nations are, from among the resident merchants of the foreign country, but specially delegated from America and sent to Europe on the particular mission, and continuing in Europe principally in a mere consular character. But in that case, as well as in the case of the American consul at Amsterdam, where the same distinction was attempted, it was held, that if an American consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than in the case of any other consul. The moment he engaged in trade the pretended ground of any such distinction ceased; the whole of

(*o*) The *Vriendschap*, 4 Rob. 167, and *per Cur.* The *Indian Chief*, 3 Rob. 18.

(*p*) The *Danons*, 4 Rob. 255, (*n*); *San Jose Indiano*, 2 Gallison, U. S. 294.

(*q*) The *Indian Chief*, 3 Rob. 13.

that question is therefore as much concluded as any question in law can be (r).

In the case of factories in the Eastern parts of the world, European persons trading under the shelter of those establishments, are conceived to take their national character from that association under which they live and carry on their national commerce. It is a rule of the law of nations applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the Western parts of the world, in which men take their present national character from the general character of the country in which they are resident. And this distinction arises from the nature and habit of the countries. In the Western parts of the world, alien merchants mix in the society of the nations: access and intermixture are permitted and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue sojourners and strangers as all their fathers were; *Doris amara suam non intermisceat undam*; not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory, under whose protection they live and carry on their trade. With respect to establishments in Turkey, it has been decided that a merchant carrying on a trade at Smyrna, under the protection of the Dutch consul, was to be considered as a Dutchman. So in China, and generally throughout the East, persons admitted into a factory are not known in their own

(r) *The Indian Chief*, 3 Rob. 27; *The Falcon*, 6 Rob. 197; *The Josephine*, 4 Rob. 26; *Arnold v. U. Insurance Co.*, 1 Johnson, 363; *Kent Comm.* 44; *Griswold v. Washington*, 16 Johnson, 348; *Kent Comm.* 68.

peculiar national character; and being not admitted to assume that of the country, they are considered only in the character of that association or factory. A Jew living in a Dutch establishment, under the sovereignty of the Rajah of Cochin on the coast of Malabar, claimed under the character of a subject of the Rajah of Old Cochin, but he was held to be a Dutchman. But persons resident in the British territory in the East are upon the same footing as persons resident in any other part of the British dominions (*s*).

As national character cannot be acquired by a mere intention of settling, so neither can it be divested by a mere intention of removal. A mere intention to remove has never been held sufficient without some overt act, being merely an intention residing secretly and undistinguishably in the breast of the party and liable to be revoked every hour. Something more than mere verbal declaration—some solid fact, shewing that the party is in the act of withdrawing, has always been held necessary in such cases (*t*). Thus where a cargo was captured, which had been shipped without knowledge of the war by an American domiciled in the enemy's country, whose intention to remove was proved by his correspondence, but he had taken no step in pursuance of that intention; the cargo was condemned (*u*).

The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one, who is originally of another country. A person returning from residence in a foreign country to any part of the dominions of his native country is presumed to return to his native character (*v*). But the native character of a person domiciled in a foreign country is not re-vested by his returning to his own country

(*s*) The Indian Chief, 3 Rob. 22; Angelique, *ibid.* App. 7.

(*t*) The President, 5 Rob. 277; The Citto, 3 Rob. 38.

(*u*) The Venus, 8 Cranch, 253; The Frances, *ibid.* 335, 363.

(*v*) La Verginie, 5 Rob. 98.

for a temporary purpose (*w*). The character that is gained by residence ceases with residence. It is an adventitious character, which no longer adheres to a person from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*. The Courts that have to apply this principle have applied it both ways, unfavourably in some cases and favourably in others. Where a British subject had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country, but had got no further than Holland, the mother country of those settlements, when the war broke out; it was determined by the Lords of Appeal, that he was in *itinere*, he had put himself in motion and was in pursuit of his native British character, and he was held to be entitled to restitution of his property. So where an American had long resided in England, but intended to remove, and his ship was engaged by his agent, under a *bonâ fide* belief that his principal had quitted England, in a trade illegal in a British merchant, and he had actually quitted England before the ship was captured; he was held entitled to restitution (*x*). So where a British subject, settled in a house of trade in Holland, had taken early measures to withdraw himself on the breaking out of war; had made arrangements for the dissolution of partnership, and was only prevented from removing personally by the violent detention of all British subjects, who happened to be in the territories of the enemy (*y*).

When a Dutch island was taken by the British forces and restored; and it was agreed by treaty, that three years should be allowed to the inhabitants for removing their property acquired or possessed during the war; and within a short time after the notification of the treaty hostilities recommenced,

(*w*) *Junge Riuter*, 1 Acton, 116; *The Friendschaff*, 3 Wheaton, 51; *The Vriendschap*, 4 Rob. 168.

(*x*) *The Indian Chief*, 3 Rob. 12.

(*y*) *The Ocean*, 5 Rob. 90; *vide* Heinecc. Comm. in Grot. iii. 4, vii. 2.



and the island surrendered to the British forces; it was held, that as to persons settled there during British possession, the presumption of an intention to remove was established in their favour by the terms of the treaty, which shewed it to have been the expectation of the contracting parties, that they would remove. The term allowed by the treaty not having expired, and the goods, which were shipped in time of peace having been captured after the island had become part of the British dominions, it was held, that they were to be admitted to the *jus postliminii* and entitled to protection as British subjects. But as to persons who had settled there before the period of British possession, and who were not contemplated by the treaty and could not be supposed to be likely to relinquish their residence, because that possession had ceased, it was held, that they were to be considered as persons resident in the mother country of the colony, and that it was necessary that they should produce evidence of an intention to remove, the presumption not being in their favour (z). Where persons were enemies at the time their property was seized, but became subjects by surrender before adjudication, it was held, that they were not entitled to the *jus postliminii*, because there was no return to the original character, upon which only a *jus postliminii* can be raised. The original character at the time of seizure and immediately prior to hostilities was Dutch. The character, which the events of war produced was that of British subjects; and although the British subject might, under circumstances, acquire the *jus postliminii* upon the resumption of his native character, it never can be considered, that the same privilege accrues upon the acquisition of a character totally new and foreign (a).

Secondly, Of commercial domicile or national character acquired by trade. Domicil by residence in the enemy's country is considered as adherence to the enemy, inasmuch

(z) *The Diana*, 5 Rob. 60.

(a) *The Boedes Lust*, 5 Rob. 233.

as it increases his strength through contribution to taxes and other means, and, consequently, impresses a hostile character on the person domiciled, and renders his property liable to confiscation as enemy's property (*b*). The same principle applies more forcibly to neutral merchants engaged in carrying on the enemy's trade; more especially such trade as in time of peace is confined to native merchants. Such conduct, in the latter case, amounts to interposition in the war; it relieves the enemy from the pressure of the naval forces of the other belligerent, and the mere fact of the enemy admitting foreigners to a participation in trade, from which they are excluded in time of peace, proves the importance of the relief. The grand fundamental duty of neutrality is, that a neutral is not to relieve a belligerent from the infliction of his adversary's force, knowing the situation of affairs upon which the interposition of his act would have such a consequence. Neutrals may not be bound to inquire very accurately, but if it is clearly declared, either by the act itself, or a fortiori by express acknowledgments, they are bound to take notice of it, and to regulate their conduct accordingly. They cannot afford assistance without being guilty of a direct interposition in the war. Nor does it affect the justice of the case at all, that such assistance is not given gratuitously, though done *lucranda causâ*, it is not less an unlawful interposition. A man does not send contraband out of pure love of the enemy, but with a view of obtaining advantage to himself by relieving the enemy's distress. If it is a sound principle of the law of nations, that you are not to relieve the distress of one belligerent to the prejudice of the other, any advantage that you may derive from the act will not make it lawful. The adversary has a full right to destroy his commerce, and you are not, from a prospect of advantage to yourself, or from any other motive, to step in on every outcry for help, to rescue him

(*b*) Grot. iii. 4, vi. vii.; Heinecc. Comm. in loc.; The Harmony, 2 Rob. 322.

from the gripe of his adversary (*c*). Such interposition, in the language of Grotius, is like stepping in to rescue a criminal from the grasp of justice, and renders the intruder liable to the penalty of confiscation (*d*). The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers, in which the essence of neutrality consists (*e*). Neutrals are prohibited from all interposition in the war, and from all acts, whereby a belligerent may be obstructed in the exercise of his lawful rights (*f*). It was laid down by the appeal Court of the United States in 1782, that the subjects of a neutral nation cannot, consistently with neutrality, combine with hostile subjects to wrest out of the hands of belligerents the advantages they have acquired over the enemy by the right of war, for this would be taking a decided part with the enemy. On the conquest of Dominica a capitulation took place, and by that capitulation commercial intercourse, between Great Britain and the Island, was prohibited. The object was to weaken the power of Great Britain, by lessening her naval and commercial resources. A neutral vessel was employed in covering British property in trade with Dominica. It was held, that this was a flagrant violation of the duties of neutrality, a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the

(*c*) The Rendsborg, 4 Rob. 126.

(*d*) Grot. iii. 1, v. iii.

(*e*) The Eliza Ann, 1 Dod. 244.

(*f*) Grot. iii. 17, iii.; Bynk. Q. J. P. i. ix. *Horum officium est omni modo cavere, ne se bello interponant, et his quam illis partibus sint vel aequiores vel iniquiores. Hoc est, in causâ belli alterum alteri ne præferant, et eo solo recte defunguntur, qui neutrum partium sunt. Nescio an satisfaciant, quæ Grotius dixit "Eorum qui a bello abstinent officium est, nihil facere, quo validius fiat is, qui improbam fovet causam, aut quo justum bellum gerentis motus impediatur."* Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum, ejus non est inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus minusue tribuere vel negare. Si melius sim, alteri non possum prodesse, ut alteri noceam.

re-establishment of a commerce, which she had lost by the conquest of Dominica; and the vessel was condemned (*g*). Upon the same principle it has been held, that the employment of a vessel to cover and protect enemy's colonial trade from the just rights of war, is such a gross departure from neutrality, that a ship so employed is liable to condemnation (*h*).

In a former war there was a determination in the case of two persons, one resident in St. Eustatius, the other in Denmark, who were partners in a house in trade in St. Eustatius. The one who resided there forwarded cargoes to Europe; the other received them in Amsterdam, disposed of them there, and then returned to Denmark. There was also the case of some persons, who emigrated from Nantucket to France, and there carried on a fishery, very beneficial to the French. In that case the property of a partner domiciled in France was condemned; whilst the property of another partner resident in America was restored. From these two cases a notion had been adopted, that the domicil of the parties was that alone, to which the Court had a right to resort; but the case of Coopman was decided on different principles. It was there said, by the Lords, that the former cases were merely cases at the commencement of a war; that in that case, a person carrying on trade habitually in the country of the enemy, though not resident there, should have time to withdraw himself from that commerce, and that it would press too heavily on neutrals to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation. But it was then expressly laid down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connexion during the war, he should not protect himself by mere residence in a neutral country. That decision instruct us in this doctrine, a doctrine supported by strong principles of equity and propriety; that there is a

(*g*) The Brig Estern, 2 Dallas, 34.

(*h*) *Per cur.* The Calypso, 2 Rob. 161.

traffic, which stamps a national character on the individual, independent of that character, which mere personal residence may give him (*i*). A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. That he has no fixed counting-house in the enemy's country will not be decisive. It is a vain idea, that a counting-house, or a fixed establishment, is necessary to make a man a merchant of any place; if he is there himself, and acts as a merchant of that place, it is sufficient, and the mere want of a fixed counting-house will not make a breach in the mercantile character, which may well exist without it. Thus, where a person was settled in England, and engaged in extensive manufactures there, but had an agent at Amsterdam to receive letters, which were addressed to him in the name of himself and company at Amsterdam, and went to Amsterdam, and there made a shipment; it was held, that in respect of this shipment, he was to be deemed a Dutch merchant (*k*). Where a neutral merchant went to France to collect outstanding debts, and invested part of the money received, in a speculation of sending a cargo to Lisbon, because that port afforded a favourable market; it was held, that this was not the case of a man withdrawing his property, but of one engaging in new speculations, and standing on the footing of any other merchant in the enemy's country (*l*). Where a person domiciled in a neutral country is a partner in a house of trade in the enemy's country, that circumstance impresses upon him a hostile character, only in respect of the transactions of that partnership (*m*). So a merchant domiciled in a neutral country, and having a house of trade there, and being

(*i*) The *Vigilantia*, 1 Rob. 1.

(*k*) The *Jonge Klassina*, 5 Rob. 297.

(*l*) The *Dree Gebroeders*, 4 Rob. 232.

(*m*) The *Portland*, 3 Rob. 41.

also a partner in a house of trade in a belligerent country, may lawfully carry on trade with the enemy on account of his neutral house, provided that it does not originate from his house in the belligerent country, nor vest an interest therein. Nor will the circumstance of his being in the belligerent country for a special purpose, and giving orders during his stay there for a shipment in the enemy's country, on account of his neutral house, bring his property into jeopardy, or render it liable to be considered as the property of a subject engaged in trade with the enemy (*n*). So, where a shipment was made by a house of trade in the enemy's country to a house of trade in a neutral country, *bonâ fide* on account and risk of the neutral house, restitution was decreed; and it was held, that the identity of the two houses was immaterial (*o*). Where a native Dutchman, domiciled in a Prussian port, was engaged in fishing, off the Dutch coast, and sometimes resorted to Dutch ports to procure bait; but sold his fish at sea; he was held not to be engaged in Dutch trade; but the contrary was held, where a person, under similar circumstances, had delivered his cargoes in Dutch ports (*p*). Where neutrals were carrying on the whale fishery of France, without having any footing in a neutral country, or any visible thread of connexion with it, but carrying back the produce to France, and supplying the manufactures and industry of France, without any communication or intercourse whatever with the neutral country; it was held, that persons carrying on such a trade, were just as much to be considered as incorporated with the trade of France, as if they were native merchants of France, and that their property, so employed, was justly liable to confiscation, be their residence where it might (*q*). So where a ship that went from Amsterdam regularly and habitually to

(*n*) The Herman, 4 Rob. 228.

(*o*) The Antonia Johanna, 1 Wheaton, 159.

(*p*) The Liesbet, 5 Rob. 283.

(*q*) The Susa, 2 Rob. 251.

Greenland, and returned to Amsterdam, there to deliver her cargo, was purchased in Holland by a neutral subject, avowedly for the purpose of continuing the same course of commerce. The question was, whether she was to be considered as a Dutch or neutral vessel? It appeared that she was fitted out uniformly from Amsterdam with Dutch manufacture and for Dutch importation, in all these respects employing and feeding the industry of that country; she was managed by a Dutch ship's husband, and finding occupation for the commercial knowledge and industry of the inhabitants of that country; commanded by a Dutch captain, manned by a Dutch crew, and bringing back the produce of the voyage for Dutch consumption and Dutch revenue, and transferred by the Dutch, because they themselves were unable to carry on the trade avowedly in their own persons. This was held to be a Dutch commerce in a very eminent degree, not only in its essence, but for the very hostile purpose of rescuing and protecting the Dutch from the naval superiority of Great Britain, and that the vessel must be liable to condemnation, unless it could be maintained as a rule without any exception whatever, that the domicile of the proprietor constitutes the national character of the vessel. On this point the rule is, that where there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct, which lead to a contrary conclusion. It is a known and established rule, with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation, under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country. In like manner and upon similar principles, if a vessel purchased in an enemy's country, is by constant and habitual occupation continually employed in the trade of that country, commencing with the war, continuing

during the war, and evidently on account of the war; on no ground can it be asserted, that such a ship is not to be deemed a ship of the country for which she is navigating, in the same manner as if she belonged to the inhabitants of it. The Court held, that a ship employed, as that ship appeared to have been, is in every respect to be considered as a vessel of that country in whose navigation under all these circumstances she was habitually employed; and the ship was condemned (r).

By a contract under the Spanish government, a privileged monopoly of the tobacco trade of certain Spanish settlements was granted for three years, and that privilege guarded by other privileges of a high nature. Goods were to be imported, and other goods were to be exported, duty free. They were to be sold to the Spanish government, and for the use of the Spanish settlement. Such a contract gives the full use of the Spanish character. It may possibly go further, since there is no reason to suppose that a Spanish merchant, merely as a subject of Spain, would have been admitted to such privileges in the ordinary course of his private trade. To such a state nothing is wanting to constitute the absolute Spanish character, but actual bodily domicil. The parties could hardly be said to want even that, because they had a stationed resident agent in the Spanish settlement for the purpose of conducting this permanent commercial undertaking. It is not indeed held, in general cases, that a neutral merchant trading in the ordinary manner to the country of a belligerent, does contract the character of a person domiciled there by the mere residence of a stationed agent; because, in such cases, the effect of such a residence is counteracted by the nature of the trade and the neutral character of the merchant himself. But it may be very different where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There the nature of his trade does not protect him.

(r) *The Vigilantia*, 1 Rob. 1.



on the contrary, the trade itself is the privileged trade of the enemy, putting him upon the same footing as their own subjects, or even above it. This circumstance operates to fill up the totality of all, that is required to constitute a Spanish character. This being the state in which the principal contractor would have stood under the contract, the legal consequence was held to extend to subordinate contractors engaged in carrying it into execution, and to clothe them with the same character to the extent of the particular transaction. It is by nothing peculiar to his own character that the principal contractor would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract and by acting upon it. If other persons take their share and accept those benefits, they take their share also in the legal effects. As they accepted his privileges and adopted his resident agents, it would be monstrous to say, that the effect of the original contract is to give the Spanish character to the contracting person, but that he may dole it out to a hundred other persons, who in their respective portions are to have the entire benefit, but are not to be liable to the effect of any such imputations. The consequence would be, that such a contract would be protected in the only mode, in which it could be carried into effect. For a contract of such extent must be distributed; and if every subordinate person is protected, then here is a contract, which concludes the original undertaker of the whole, but in no degree affects one of those persons who carry that whole into execution. On these grounds, it was held that these persons were liable to be considered as persons clothed in this transaction with the character of Spanish merchants (*s*).

In such cases, the magnitude of the speculation may be a matter of much significance. It may be difficult to lay down the precise bounds where ordinary commerce ends, and extra-

(*s*) *Anna Catherina*, 4 Rob. 107.

ordinary speculation begins; it is all relative. But it may not be difficult to judge of a particular transaction, whether it is an adventure in the ordinary proportions of even a large and extended commerce, or whether it is not so gigantic, and so exceeding all credible bounds of trade, as to shew, that it has an unnatural origin arising out of something more than commercial relations,—out of existing political situations and views, and framed with an attention to political consequences. Suppose, for instance, that a merchant should at the beginning of a war contract with a belligerent for the whole produce of a colony during the war, that must be held to be an illegal contract, because made evidently with the intention and consequence of placing that part of the belligerent's dominions, as to its productions, out of the reach of war, and in a perfect state of security, in fraud of the rights of the other belligerent. If this could be allowed, the contract might be extended still further, to the whole commerce of the enemy. Such a contract never could be held legal, although at the same time it might be difficult to assign a reason why in peace this should not be legal, if it were possible. An illegality arises, in fact, from its being a contract in contemplation of war, and which never could have existed at all, but as an insurance from the pressure of the war, and with a view to evade the rights which arise out of war, and in fraud of the belligerent, to which consequences the neutral could not be blind. As to the effect of such a contract, it would make no great difference, whether it was indefinitely framed so as to include the whole commerce, or whether it specified particular large quantities, which might still be so large as to compose nearly the average amount of that branch of the enemy's whole trade. In proportion as the contract approached to this extent, it would approach towards illegality; it would acquire a political character. The neutral merchant would be no longer a private merchant of his own country trading in common with others, but he would be the great public and political agent of the belligerent in such a

transaction, acting for his relief under the pressure of his enemy. Thus, where a trade invested with particular privileges, and secured by peculiar contracts, had been transferred from the Dutch East India Company, to which it exclusively belonged, to neutral merchants, upon an express acknowledgment understood and acted upon on both sides, that it was so transferred in order to relieve the goods which were confined by the pressure of the war, and could not be delivered by any other practicable mode, the question was, whether a commerce formed with such views, and so conducted, could be entitled to a neutral character? It is a possible thing that commerce may not be neutral, though the property is; and that, if that is the case, the mere neutral ownership will not be a sufficient title to restitution. In this instance, the very preamble to the contract stated the motive of opening the trade, and declared it to be owing to the pressure of the war, and to no other cause. The disclosure of such a motive creates obligations on a neutral arising from his relation to the other belligerent. In this case the articles contracted for were to consist of all the products, even the most valuable peculia of the company, spices, which were never permitted to be sold to foreign European traders; and the investments were made, not only with a view to the European markets generally, but to the Dutch markets themselves specially. The contract was such as approached towards a total devolution and transfer of the company's trade to the European market both in quantity and quality. It made the neutral merchant the Dutch East Indian Company *pro hac vice*. He was the privileged representative of the company bringing home their spices, *non sua poma*, not in his proper character of a neutral merchant, but as the representative of the Dutch India Company. There were also agents residing in Batavia, and although the residence of agents in the enemy's country has not been held generally to impress the character of that country upon the transactions of principals resident in a neutral country; and where the transaction itself

is perfectly neutral, the neutrality of the trade shall prevail against the effect of that circumstance; yet where the trade itself cannot claim to be so considered and is carried on from the enemy's country by agents representing their principals therein; the mere personal residence of principals elsewhere would hardly protect such a trade so conducted from being considered as the trade of an enemy. Upon these facts the Court held, that the transaction was the execution of a contract between the belligerent and a neutral merchant, framed under an admitted and avowed knowledge of the distress of that belligerent, occasioned by the superiority of his adversary's arms, with a declared intention on the part of the belligerent to relieve himself from that distress, and with a perfect knowledge of the declaration on the part of the neutral merchant; that it was a substitution of the neutral merchant in place of the belligerent with all the privileges of a peculiarly favoured corporation belonging to the belligerent country: that it was conducted by agents stationed in the enemy's foreign settlements, where foreign merchants are not ordinarily permitted to reside; that the contract was therefore unlawful, and the property engaged in the performance of it liable to condemnation (*t*).

There are transactions so radically and fundamentally national, as to impress the national character independent of peace or war or the local residence of the parties. The produce of a person's own plantation in the colony of an enemy, though shipped in time of peace, is liable to be considered as the property of an enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction independent of his own personal residence or occupation. So the flag and pass of a nation taken up in peace or in war binds the vessel almost

without exception. So in the case of a strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects by the fundamental regulations of the state; and the national character is required to be established by oath as in the case of the Spanish register ships. There, whoever asserts himself to be a proprietor by the solemn averments of an oath takes the fortunes of the community as to that property. These are all cases independent of peace or war, though generally, it cannot be denied, that the circumstances of peace or war or the contemplation of those events will form a very material distinction in the considerations by which the national character of the transaction is to be judged. A much greater latitude is allowed in peace than in war, for this plain reason, because there are no rights of a third party concerned; there is no fraud to be guarded against. When war comes, it is necessary to shut up some of the avenues of commerce, because otherwise the belligerent rights could not be protected. Those avenues in time of peace are perfectly open as commodious to the parties and incommodious to nobody else; for all other parties are friends, and as such interested in their prosperity. A greater latitude therefore may be expected to prevail in time of peace, and in practice has been allowed. Thus, a contract to bring home Batavian produce to Holland, to be under the disposal and management of the Dutch East India Company, made after preliminaries of peace to relieve a pressure proceeding from a former war, but without any view of sheltering the property from capture, was held to be lawful; and property shipped under the contract and captured on the breaking out of war was restored (*u*).

Upon the breaking out of war it is the right of neutrals to carry on their accustomed trade, with the exception of the particular cases of a trade to blockaded places or in contra-

(*u*) The *Vrouw Anna Catharina*, 5 Rob. 161.

band articles, (in both which cases their property is liable to be condemned) and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. In the accidents of war the property of neutrals may be variously entangled and endangered; in the nature of human connexions it is hardly possible, that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce. The trade of belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But with reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on in time of war his accustomed trade to the utmost extent, of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use or habit in time of peace, and which in fact he can obtain in war by no other title, than by the success of one belligerent against the other, and at the expense of that very belligerent, under whose success he sets up his title. Such is the colonial trade generally speaking. It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs, and that to a double use; that of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country the general policy respecting colonies belonging to the states of Europe has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadeloupe, and the sugar of Jamaica or Guadeloupe into the

interior parts of Germany. But as to any direct communication or advantage resulting therefrom, Jamaica or Guadeloupe are no more to Germany, than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. It is the indubitable right of a belligerent to possess himself of such places, as of any other possession of the enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence as colonies on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent of course, and if the belligerent chooses to apply his means to such an object, what right has a third party perfectly neutral to step in and prevent the execution? No existing interest of his own is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, true it is, that you have by mere force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing it, prevent its further progress. You have in effect and by lawful means turned the enemy out of the possession, which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender by means of that very opening, which the prevalence of your arms alone has effected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended not for your own interest, but for the common benefit of others. Upon these grounds it cannot be contended to be a right of neutrals to intrude into a commerce that has been uniformly shut against them, and which is forced open merely by the pressure of war; for when the enemy,

under an entire inability to supply his colonies and to export their products affects to open them to neutrals, it is not his will, but his necessity, that changes his system ; that change is the direct and unavoidable consequence of the compulsion of war ; it is a measure not of his councils, but of his adversary's force. These compelled relaxations of colonial monopoly are acts of distress, signals of defeat and depression ; they are no better than partial surrenders to the force of the enemy for the mere purpose of preventing a total dispossession. Upon these and other grounds an instruction issued at an early period of the revolutionary war, for the purpose of preventing the communication of neutrals with the colonies of the enemy on the same footing, on which the prohibition had been legally enforced in the war of 1756 ; a period, when Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals were known and revered by every state of Europe. Upon further inquiry it turned out, that one favoured nation, the Americans, had in times of peace been permitted by special convention to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice, that that case should be specially provided for ; but no justice required that the provision should extend beyond the necessities of that case : whatever goes beyond is not given to the demands of strict justice, but is matter of relaxation and concession. Different degrees of relaxation have been expressed in different instructions, issued at various times during the existence of war. But no such relaxation has gone the length of authorizing a direct commerce of neutrals between the mother country of the enemy and its colonies, because such a concession could not be admitted without a total surrender of the principle. For allow such a commerce to neutrals and the mother country of the enemy recovers with some increase of expense the direct market of the colonies and the direct influx of their produc-



tions ; it enjoys, as before, the direct duties of import and export, the same facilities of sale and supply, and the mass of public convenience is very slightly diminished (*v*).

By the general law of nations, it is not competent to neutrals to assume in time of war a trade with the colonies of the enemy, which was not permitted in time of peace, and ships and cargoes engaged in such a trade are liable to confiscation (*w*). This principle was not applied to the colonial trade of France during the first American war, because it was inapplicable upon the supposition, that the colonial monopoly of France had been abolished before the war. It was not then known that the monopoly was only suspended in contemplation of war, and was to be renewed at the return of peace ; just as at a subsequent period the colonial monopolies of France and Spain, which had been suspended during the previous war, were renewed in 1801 (*x*). Every one is at liberty to abridge his own rights, and consequently, the executive government of a state may relax its rights of capture and confiscation by occasional instructions to its cruisers to any extent which it deems expedient. In such cases, the question for its Courts of Prize to consider, is not whether the executive government has done wisely in restraining the relaxation within certain limits, but whether by the law of nations, ships and cargoes not falling within the limits of those relaxations are liable to confiscation. It is not the instructions, that impose the penalty of confiscation, they only direct cruisers to bring in for lawful adjudication, and the question then arises, whether by the law of nations the penalty of confiscation attaches ? Although the British instructions of 1793, could not be said to make neutral property liable to confiscation, if it were not so by the general law, when engaged in a

(*v*) The Immanuel, 2 Rob. 186.

(*w*) The Wilhelmina, 4 Rob. App. 12.

(*x*) 4 Rob. App. 10 ; 6 Rob. App. note (1) ; The Emanuel, 1 Rob. 299.

trade with the colony of the enemy, which is not permitted to foreign vessels in time of peace; it will not be too much to attribute to those instructions to say, that they are to be taken as a proof, that the government of this country understood such to be the law of nations, at the time when those instructions issued. From the conduct of France also in opening the ports of her colonies, a short time previous to the breaking out of the American war, it is manifest, that the principle was thoroughly understood by that government to be agreeable to the law of nations (*y*). The French Ordinance of the 23rd of July, 1704, § 6, provides, that any neutral vessel sailing to any port, except ports of its country, from any port of the enemy, having there taken in her cargo or part of her cargo, shall be liable to be condemned as prize; although such cargo should be on account and risk of the subjects of his Majesty or of any allied or neutral state. This provision was not affected by the subsequent Ordinance of the 21st of October, 1744; and, though not mentioned therein, continued in force as to all neutrals not protected by treaties (*z*).

The policy of relaxing the strictness of the legal rule is a matter to be determined by the sovereign, and as to the extent of that relaxation, prize courts must be guided by his instructions (*a*). It is only from the instructions, that neutrals derive any right of carrying on with the colonies of the enemy in time of war a trade, from which they are excluded in time of peace (*b*). Much argument has been employed on grounds of commercial analogy; this trade is allowed; that trade is not more injurious; the obvious answer is, that the true rule of the Prize Court is the text of the instructions. What is not found therein permitted is understood to be prohibited upon this plain principle, that the colonial trade is generally

(*y*) *Wilhelmina*, Lords, 4 Rob. App. 11.

(*z*) *Val. Comm.* iii. 9, xi.

(*a*) *The Providentia*, 2 Rob. 142; *The Immanuel*, 2 Rob. 186.

(*b*) *The William*, Lords, 5 Rob. 385.

prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation; where it has distinguished and stopped short in several stages, individuals have no right to go further upon a private speculation of their own (*c*).

Soon after the commencement of the revolutionary war, the first set of instructions that issued, were framed, not on the exception of the American war, but on the antecedent practice, and directed cruisers to bring in for lawful adjudication all vessels laden with goods the produce of any colony of France, or carrying provisions for the use of any such colony. But American vessels had been admitted in time of peace to trade in certain articles and on certain conditions with the colonies of France and England. The ordinary trade of America was therefore unlawfully abridged by the foregoing instructions. In consequence of representations made by the American government, new instructions were issued directing cruisers to bring in all vessels laden with goods the produce of the French West Indian islands, and coming directly from any port of the said islands to any port in Europe. Afterwards the general principle was relaxed to the extent of allowing the neutral states of Europe to resort to the colonial market for the supply of their own markets; and a third set of instructions issued to bring in all vessels coming with cargoes the produce of any island or settlement of France, Spain, or Holland, directly from any port of the said islands or settlements to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships being neutral ships belong (*d*). The relaxation implied in these instructions was at first extended by construction to the country of the owner of the cargo (*e*); but it was afterwards more

(*c*) *The Immanuel*, 2 Rob. 202.

(*d*) 4 Rob. App. 2.

(*e*) *The Rosalie and Betty*, 2 Rob. 343.

correctly restricted according to the natural meaning of the words to the country of the ship (*f*). But in the case of Hamburg and Altona, where the merchants use one common exchange, and have their country houses on each side of the river indifferently, it was held; that it would be pressing the rule too harshly on the merchants of Hamburg to hold, that they should not be at liberty to enjoy the convenience which Altona affords for all purposes of commerce, and that for this purpose Hamburg and Altona must be considered as the same port (*g*). Hence, a Danish ship and cargo, captured on a voyage from Batavia to Copenhagen, and a Hamburg ship and cargo captured on a voyage from Vera Cruz to Hamburg were restored (*h*).

The trade between the mother country and its colonies has always been a prohibited trade under the general commercial system of Europe, and is so to be considered, notwithstanding any temporary alteration of the system on the part of the enemy owing to the pressure of war (*i*). Hence, a direct trading from the mother country of the enemy and his colony, was held to be illegal, and neutral property engaged in the trade was condemned (*k*). A voyage from a port of one enemy to the colony of another enemy allied in the war is equally illegal (*l*); and distress for want of water will not justify a deviation to an enemy's port in a vessel laden with colonial produce (*m*). Cargoes coming from a colony of the enemy to a neutral port in Europe, not being a port of the country to which the ship belongs are liable to confiscation. Thus, where a Danish ship was captured going from La

(*f*) The Conferenzrath, 6 Rob. 362.

(*g*) Ibid.

(*h*) The Magdalena, 2 Rob. 138; The Providentia, 2 Rob. 142.

(*i*) The Anne, Lords, 3 Rob. 91, (*n*).

(*k*) The Immanuel, 2 Rob. 186; The Nancy, 3 Rob. 83; The Phoenix, 3 Rob. 186.

(*l*) The Rose, 2 Rob. 206.

(*m*) The Star, 3 Rob. 193.

Guayra to Leghorn, with a cargo the produce of the Spanish settlement and claimed for merchants of Bremen; this was held to be a case not falling within the relaxation of the instructions, but under the general law, and upon the principle, that by the general law of nations it is not competent to neutrals to assume in time of war a trade with the colony of the enemy, which was not permitted in time of peace; the cargo was condemned (*n*). The ship also is liable to condemnation on the ground of the illegality of the voyage (*o*). So a Swedish ship and cargo taken on a voyage from an enemy's colony to America were condemned (*p*). In the case of the *Hector*, an American ship and cargo, taken on a voyage from St. Domingo to the neutral island of St. Thomas, was restored upon no intelligible principle, but apparently upon a notion that the right of confiscation was founded upon the instructions, which applied only to a voyage from the French West Indian Islands to a port in Europe. This groundless judgment was made the foundation of subsequent decisions. In the case of the *Sally*, the Court said, that in the case of the *Hector*, taken on a similar voyage, restitution took place; and in other cases it had been intimated by the Court, that such voyages were not illegal; that under such circumstances there must be restitution, whatever might have been the opinion of the Court, if the matter had been res integra (*q*).

As to the New World, the system of all European countries is so much the same as to afford a reasonable presumption that the trade to colonies in the West Indies is exclusively confined to the subjects of the parent state, unless the contrary is shewn. The presumption is not so strong with respect to settlements in the East; since the trade to those

(*n*) The *Wilhelmina*, Lords, 4 Rob. App. 4.

(*o*) *Volant*, &c., Lords, 4 Rob. App. 13; The *Lucy*, *ibid.*; *Jonge Thomas*, 3 Rob. 233, (*n*).

(*p*) The *Lucy*, Lords, 4 Rob. App. 13.

(*q*) 4 Rob. App., 14, 15.

countries have been established on a different principle, by which foreigners are permitted to trade in those parts. Thus, the trade to Senegal was not considered an exclusive colonial trade, because foreigners were permitted to go there for the purpose of a general trade, though there might be a monopoly of gum. So where it was not proved that the trade of Batavia and the Isle of France respectively were monopolies in time of peace, restitution was decreed (*r*).

It is a necessary consequence of the relaxation of the general rule, whereby neutrals are permitted to import colonial produce into their own country; that when such produce has been bonâ fide imported and incorporated into the common stock of the country, it may lawfully be exported to the mother country of the colony (*s*). But for this purpose, the importation must be bonâ fide. A colourable or fraudulent importation, or merely touching at a port without any importation, is attended by no such effect. A continued voyage from the mother country to the colony of the enemy, or from the colony to the mother country, or to any other ports but those to which the vessel belongs, will subject the cargo to confiscation. It is an inherent and settled principle in all cases in which the question has come under discussion, that the mere touching at any port, without importing the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port (*t*). Nobody ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed would change its denomination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or direction of the deviation, whether it be of more or

(*r*) *The Juliana*, 4 Rob. 328; *The Patapasco*, Acton.

(*s*) *The Polly*, 2 Rob. 361.

(*t*) *Per Cur.* *The Maria*, 5 Rob. 368.

fewer leagues, towards the coast of Africa or towards that of America. Neither can it be contended, that the point, from which the commencement of a voyage is to be reckoned, changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of the ship's progress. The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be for the purpose of airing or drying the goods or of repairing the ship, would any man think of describing the voyage as beginning at the place, where it happened to become necessary to go through such a process? Again, let it be supposed, that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading; and that, therefore, he lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place, that the goods, were taken on board; would such a contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun at a different place? The truth may not always be discernible; but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire to make it appear to have been ended. That those acts may have been attended with trouble and expense, cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to shew the purpose for which the acts were done; but if the evasive

purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, that have been employed to cover a breach of it. Between the actual importation, by which a voyage is really ended, and the colourable importation, which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them: the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation, the true purpose of the owner cannot be affected without them; but in a fictitious importation, they are mere voluntary ceremonies, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, never would be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make. In the case before the Court, the cargo was taken on board at Lagaira. It was, at the time of the capture, proceeding to Spain, but the ship had touched at an American port. The cargo was landed and entered at the custom-house, and a bond was given for duties to the amount of 1239 dollars. The cargo was reshipped, and a debenture for 1211 dollars, by way of drawback, was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on the 29th of May; on that day the bond for securing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of June; and on the 3rd of June the vessel is cleared out as laden and ready to proceed to sea. The landing, thus almost instantaneously followed by the reshipment, has little appearance of having been made with a view to actual importation. The claimants, instead of shewing that they really did import the cargo, stated in their attestation the reasons that determined



them not to import it. Supposing that their original intention was to have imported this cargo into America, with a view only to the American market; yet their intention had been changed before the arrival of the vessel. Nothing is alleged to have happened between the landing of the cargo and its reshipment, that could have the least influence on their determination. Knowing beforehand the comparative state of the two markets, they neither tried, nor meant to try, that of America, but proceeded with all possible expedition to go through the forms that have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It never can be contended, that an intention to import once entertained is equivalent to importation; and it would be a contradiction in terms to say, that by acts done after the original intention has been abandoned, such original intention has been carried into execution. The claimants seem to have conceived, that the inquiry to be made here was not whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances, which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. The judgments antecedent to that in the *Essex*, had clearly and unequivocally negatived the existence of the alleged rule of decision.

The first case of the kind, that of the *Polly, Lasky*, occurred in the High Court of Admiralty in February, 1800. The learned Judge of that Court expressly disclaimed the attempt to define what should be deemed universally the test of a *bonâ fide* importation. He did, indeed, lay great and just stress on the payment of the American import duties, which was then sworn to have been actually made; but still it was as evidence of *bonâ fide* importation. The very statement, that the thing in

question was the bona fides of the importation, did of necessity exclude the supposition that one uniform effect was in all cases to be ascribed to a given set of circumstances, without regard to the manner in which their effect as evidence might be varied by other circumstances, with which, in different cases, they might be found contrasted, or combined. The first case of this kind, which came before the Lords of Appeal, was that of the *Mercury*, Roberts, in January 1802. By all the documents found on board, the cargo appeared to have been laden at Charlestown; and among these documents there was an attestation sworn at the custom-house, that all the parts of the cargo which were of foreign growth or manufacture, had been legally imported, and the duties thereon paid or secured. It came out, however, in the depositions of the witnesses examined on the standing interrogatories, that the cargo had been laden at the Havannah, and that it never had been landed at Charlestown, the place of the alleged shipment. It being evident that the touching at Charlestown was for the mere purpose of giving to the voyage the colour and appearance of having begun there, the Court affirmed the sentence of condemnation, without previously endeavouring to ascertain whether any duties had really been paid in America. The true nature of the transaction being clearly ascertained, it seemed immaterial to inquire whether the payment of duties had been one of the means employed to disguise it.

The next case that occurred was that of the *Eagle*, Weeks, in May, 1803. By the original evidence, it appeared that the cargo had come from Bilboa to Philadelphia, where it had been landed, and whence it was proceeding by the same vessel to the Havannah. The condemnation in the Court below had proceeded on the ground that the cargo was contraband of war. But the only question in the Court of Appeal was with regard to the continuity of the voyage; as to that, further proof was ordered. The landing at Philadelphia was already in evidence; therefore, according to the supposed rule, the

only other circumstance with regard to which proof could be material, was the payment of duties; but the Court did not so limit their inquiry. In order to endeavour to discover the real purpose and intention of the owner, they called for the orders he had given concerning the purchase and shipment of the cargo at Bilboa, and also for the insurances made from thence. Had it clearly appeared from those orders and insurances that the cargo had been originally destined to the Havannah, it cannot be supposed that the Court would have paid no regard to the result of the inquiry which they had directed, but would have ascribed to the payment of duties such a conclusive effect as would have rendered every other part of the inquiry perfectly nugatory. When the case came back on further proof, nothing appeared in the letters of orders to shew a destination to the Havannah; no insurance had been effected on the first branch of the voyage. It was positively sworn, that the import duties, amounting to 1333 dollars, had been actually paid; also that the cargo had been warehoused at Philadelphia, and advertised and intended for sale there, but that not being able to obtain a price that would answer, the owner had resolved to ship it for the Havannah. Giving a credit to this evidence which it did not deserve, the Court thought that a complete bonâ fide importation had taken place, and therefore decreed restitution of the ship and cargo.

The case of the schooner Freeport, and the original hearing of the Essex, Orne, came on in August, 1803. The Freeport had carried from Cadiz to Boston the cargo, with which, at the time of the capture, it was proceeding to one of the Spanish colonies. The cargo had been landed and remained some time on shore; but the master, who was half owner both of ship and cargo, admitted in his claim that the cargo was intended for the Spanish West Indian market, and did not even assert any purpose of importation into America; the Court, therefore, affirmed the sentence of condemnation. The cargo having been landed, it might be taken for granted, that

whatever duties were payable had been paid; but as the case stood, the Court thought that fact immaterial, and therefore directed no inquiry with regard to it.

In the case of the *Essex*, the cargo had been brought from Barcelona to Salem, and after having been landed and reshipped, was proceeding to the Havannah. From the original evidence, there was great reason to believe that the master had from the beginning destined the cargo for the Spanish colony; but as what had passed at Salem, and what had been the conduct of the owner after the ship's arrival there, did not distinctly appear, it was thought right to give him an opportunity of entering into further proof of the alleged importation. It had never been denied, that in a doubtful case payment of duties would have great weight, and therefore the further proof was particularly directed to that point. But it having been suggested that in these cases the duties charged on landing were almost entirely drawn back on the reshipment, the Court called for an account of the drawbacks, if any, which had been received. This additional inquiry sufficiently shewed, that the same effect would not be ascribed to a nominal as to an actual payment of import duties. With a view of further elucidating the transaction, the insurances made, if any, were directed to be produced. The final event of this case will be afterwards noticed.

The next case was the case of the *William, Trefrey*. It was first heard in May 1804. By the original evidence, the landing of the cargo at Marblehead was proved. It was also in proof, that the duties had been secured according to law. So the owners swore; so the custom-house certified. It was to be supposed that duties, which were secured, were one day to be paid, and it was doubtless meant to be so understood; for the fact was suppressed, that at the moment when the certificate issued from the custom-house, and the oath was made by the owners, a debenture had been granted, which, in effect, extinguished almost the whole of the duties that had

been secured. Here was what has been said to have been held to be conclusive evidence of importation. But the Court held, that the importation was not sufficiently proved, and directed further proof to be made of it. No one, who at all attended to the proceedings of the Court, could be surprised by their again deciding, twelve months afterwards, that such evidence was not conclusive; yet this effect of surprise was ascribed to their decision in the *Essex*, in May 1805. Upon the further proof, it appeared to the Court, that no real importation into Salem had taken place, or had ever been in the contemplation of the parties to the transaction. The sentence of condemnation was therefore affirmed.

There was not one decision in which any such principle as that the landing and payment of duties in America did absolutely, and under all circumstances, legalize the subsequent voyage had been asserted or implied, and there were at least two decisions that stood in direct contradiction to it; that in the *Freeport*, in 1803, and that in the *William*, in 1804.

The further proof in the *Essex* produced the information, that although the duties secured amounted to 5278 dollars, yet a debenture was immediately afterwards given for no less than 5080 dollars, so that on that valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated by the negotiability of the debenture. In the cases of the *Eagle* and the *Polly*, Lasky, it had been sworn that the duties had been paid; in the *Mercury* that they had been paid or secured; in the *William* that they were secured; not a word was said about drawbacks. It was, therefore, natural for the Court to understand the claimants, as they certainly wished to be understood, to be speaking of such payment of such duties as were chargeable upon importation into America, and of a security that would make the whole amount secured become payable at some future day. It is not to be contended, that importation cannot be genuine because a high duty has not been paid; but in the nature of

the thing the payment of a slight duty does not tend in the same degree to establish the bona fides of an importation, as the payment of a heavy duty would have done. The Court never held, that either would outweigh all the evidence, which could possibly be put into the opposite scale; but that the one has less weight than the other is obvious to every man's apprehension. On the application of these principles to the case of the *William*, the voyage was held to be illegal, and the sentence condemning the ship and cargo was affirmed (u).

In the case of the *Enoch*, a charter party providing for a voyage to the colony of the enemy and back to America, and thence to the mother country in Europe, was held to be an absolute and conclusive fact declaratory of the intention of sending on the cargo to Europe, and to afford a complete demonstration of one entire voyage. The case of the *Rowena* happened on the same day, which the Court did not distinguish in judgment from the preceding case, though there was this difference between them, that it had not a charter party linking together the two parts of the original voyage. But other circumstances occurred leading to the same conclusion. These were the former habits of the vessel, from which it appeared, that she had been for a considerable number of voyages employed in the same course of trade in the hands of the same owner. The whole cargo had come from the colony of the enemy and had lain in America only a very short time, just long enough for the purpose of being landed and re-shipped. Under these circumstances, the Court thought itself bound to presume, that the original intention of sending the cargo to Europe had actuated the whole adventure. Soon after came the case of the *Maria*, in which the ship had come from Havannah to New Providence, where she was refitted, and took on board a large part of the same cargo of colonial produce with other goods belonging to the same owner and

(u) *The William*, Lords, 5 Rob. 385.

some other articles on freight, and was at the time of the capture proceeding to Amsterdam. There were no letters or writings as in the *Essex*, nor any charter party as in the *Enoch*, purporting an original intention to send on; nor were there instructions disclosing a cause of similar voyages as in the *Rowena*; but its former voyages were clear of suspicion. It was held, that there was nothing binding the Court to conclude that the voyage was a continued voyage, and that there could have been no real *bonâ fide* importation. Further proof was ordered of the owner's intention to sell in America, and that proof being admitted to be satisfactory restitution was decreed (*v*).

It is a clear and settled principle that the mere transshipment of a cargo at an intermediate port will not break the continuity of a voyage, which can only be effected by a previous actual importation into the common stock of the country where the transshipment takes place. Nor will an actual sale at the port of transshipment, under all circumstances, give it the character of a new voyage. Generally speaking, a sale is satisfactory evidence of an actual and *bonâ fide* importation; because it is to be understood in most cases, that goods are actually imported before they can be sold. But it has never been decided, that, where goods are brought to an intermediate port not *animo importandi*, but sold whilst waterborne and then transhipped, such sale with transshipment makes a new exportation from the port in which it is transacted. In order to constitute an exportation, there must be a previous importation in the case of commodities not native. Where a cargo is sold to be immediately transhipped and exported, that can never be considered as any importation at all; it is all one act of which the sale and transshipment are only stages; they lengthen the chain, but do not alter its direction.

Where the vendor brought goods from the enemy's country

without any intention of importation on his part, and transferred them for the purpose of being carried on, and the buyer purchased them yet unimported and sent them forward on his own account, but a transit duty was paid at the port of transshipment; it was held that such a transaction could not be distinguished from a sale on the high seas, and that the continuity of the voyage was not broken (*w*). The continuity of a voyage is not broken by a voluntary deviation of the master for the purpose of carrying on an intermediate trade (*x*); nor is the continuity of the voyage broken, where the destination is diverted only in consequence of a *vis major*, which the party is unable to resist. That cannot be considered a defeazance of the original illegality, any more than if the diversion had been occasioned by the fury of the elements. In both cases the original movement of the vessel must be considered, to which it must be presumed she would again immediately recur as soon as an opportunity presented itself. The act of foreign necessity, to which a vessel and cargo are giving a temporary submission no longer than they are compelled to do so, cannot be considered as a total discontinuance and abandonment of the intended voyage. The voyage of the ship and cargo, when left to themselves, would have continued the same, and must, therefore, be considered to be still existing in law, though controuled, in fact, by that overbearing necessity for the moment (*y*).

Many of the cases on the subject of national character were reviewed, and their result distinctly laid down by Mr. Justice Story in the case of the *San Jose Indiano* (*z*). In general, said that learned Judge, the national character of a person is to be decided by that of his domicile: if that be neutral, he acquires the neutral character; if otherwise, he is affected with

(*w*) *The Thomyris*, Edw. 17.

(*x*) *The Joseph*, 8 Cranch, 455.

(*y*) *The Minerva*, 3 Rob. 229.

(*z*) 2 Gallison, U. S. 283.



the enemy's character. But the property of a person may acquire a hostile character altogether independent of his own peculiar character acquired by residence. In other words, the origin of the property, or the traffic in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country. Such are the familiar instances of engagements in the colonial, coasting, fishing, or other privileged trade of the enemy. So the produce of an estate belonging to a neutral in an enemy's colony is impressed with the character of the soil, notwithstanding a neutral residence. So if a vessel, purchased in the enemy's country, is by constant and habitual occupation continually employed in the trade of that country during the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicil of the owner. The principle to be extracted from these cases seems to be, that when a person is engaged in the ordinary or extraordinary commerce of the enemy's country upon the same footing and with the same advantages as resident native subjects, his property so employed is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may; and the principle seems founded in reason. Such a trade so carried on has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It serves his manufactures and industry, and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he who thus enjoys the protection and benefits of the enemy's country, should not, in reference to such a trade, share its dangers and its losses. It would be too much to hold him entitled by a mere neutral residence to carry on a substantially hostile commerce, and at the same

time possess all the advantages of a neutral character. I agree, therefore, that it is a doctrine supported by strong principles of equity and propriety, that there is a traffic that stamps a national character on the individual, independent of that character which mere personal residence may give him; and I think the case now before the Court comes clearly within the range of the principle which I have already stated. Here is a house of trade composed entirely of British subjects established in the enemy's country, and habitually and continually carrying on its trade with all the advantages and protection of British subjects. It is true, one partner is domiciled in a neutral country, but for what purposes? For aught that appears, for purposes exclusively connected with the Liverpool establishments. At all events, the whole property embarked in its commercial enterprises centres in that house, and receives its exclusive management and direction from it. Under such circumstances, the house is as purely British in its domicile (if I may use the expression), and its commerce as it could be if all the partners resided in the British empire. If the case, therefore, were new, I do not at present perceive how it could be extracted from the grasp of confiscation, from its thorough incorporation into the enemy's character.

But how stands the case upon the footing of authority? It is argued, that no decision comes up to the point, and that the Court is called upon by the captors to promulgate a novel doctrine. If, however, I am not greatly deceived, it will be found, on an attentive examination, that there is a strong current of authority all setting one way. From the cases of the *Jacobus Johannes* and the *Osprey*, an erroneous notion had been adopted, that the domicile of the parties was that alone to which the Court had a right to resort in prize causes. But in the case of *Coopman*, those cases were put upon their true foundation, as cases merely at the commencement of a war, in reference to persons, who, during peace, had habitually carried on trade in the enemy's country, though not resident

there, and therefore entitled to withdraw from that commerce. But the Lords of Appeal in that case expressly laid it down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country. Now I am utterly at a loss to know how terms more appropriate could be employed to embrace the present case, which is that of a connection with a house of trade in the enemy's country continued during the war. This doctrine, held by the highest authority known in the prize law, has been repeatedly exercised and enforced by the same learned Court. In the case of the *Portland, &c.*, the very same exception was taken as to Mr. Ostermeyer, who, though domiciled at Blankanese, was alleged to be engaged in the trade of Ostend, either as a partner or as a sole trader. In those cases the general principle was explicitly admitted, and one vessel, the *Jonge Emilia*, eventually condemned on that ground. It is a mistake of the learned counsel for the claimant, that the Court in those cases confined the further proof to the fact, whether Mr. Ostermeyer was a sole trader at Ostend. It will appear, on careful examination, that further proof was also required as to the alleged partnership, and particularly as to a letter in Frow Louisa pointing to that partnership. In the *Jonge Klassina*, which was a very strong case of its rigid application, Sir William Scott avows the same doctrine, and declares that a man may have commercial concerns in two countries; and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to transactions originating respectively in those countries. The case of the *Hennan*, so far from impugning the principle, evidently proceeds upon the admission of it; and I think it may be affirmed without rashness, that not a single authoritative dictum exists, which can shake its force. It has been attempted to distinguish those cases from that before the Court, by alleging, that none of them present the fact of a shipment

made from a house in the enemy's country to its connected house in the neutral country. But it does not seem to me, that this difference presents any solid ground, on which to rest a favourable distinction. On the whole, I am of opinion, that the shipment in this case being made by a house in the enemy's country for their own account, in a voyage originating in that country, must be deemed enemy's property; and that the share of the partner having a neutral residence must follow the fate of the shares of his partners.

The captors have contended, that the same principle applies in cases, where a house in the enemy's country ships goods to one of its partners domiciled in a neutral country, either in his single name, or to a neutral house there in which he is also a partner; and, e converso, where a partner of a neutral house is domiciled in the enemy's country, and ships to that house goods the manufacture of that country. In respect to the two former cases, I agree at once to the position, if the shipment be made on the account and for the benefit of the house in the enemy's country; for in such case the neutral partner or house acts but as their agent, and the whole property and profits of every enterprise rests in the hostile house. Under such circumstances, it is wholly immaterial whether the consignment be to a partner or to a stranger. The property, in its origin, transit, and return, is thoroughly imbued with a hostile character. And the same may be affirmed of the third case, if the partner so domiciled in the enemy's country be really engaged in the general commerce of that country for the exclusive benefit of his neutral house; for although in general the residence of a stationed agent in the enemy's country will not affect the trade of a neutral principal with a hostile character, yet that is true only as to the ordinary trade of a neutral as such, carried on in the ordinary manner. But when such trade is carried on not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy, in the same manner and with

the same benefits as a native merchant, it would seem to be embraced in the general doctrine which I have already stated. But the principles contended for by the captors extend to cases where a shipment has originated in a house in the enemy's country, of which such partner is a member, although the shipment be *bonâ fide* and exclusively on account of such neutral partner or house; and the declaration of Sir William Scott in the *Jonge Klassina*, is relied on as an authority which supports the argument. But I do not think that the language of Sir William Scott, correctly considered, admits of this interpretation. He is merely alluding to the origin of transactions, which exclusively regard the interests of a house of trade established in a particular country, and not transactions where it acts merely as agent or shipper for other persons. To shew this more distinctly, the learned Judge, in the *Portland*, says, "I know of no case, nor of any principle, that could support such a position as this, that a man having a house of trade in the enemy's country, as well as in a neutral country, shall be considered in his whole concerns as an enemy's merchant, as well in those which respect solely his neutral house, as in those which belong to his belligerent house" (z). The only light in which it could affect him, would be as furnishing a suggestion, that the partners in the house in one place were partners in the house in the other. And in the *Herman*, where a shipment was actually made from an enemy's port, by order of the neutral house, to the belligerent house, but on account of the former the property was adjudged to be restored. These cases do, as I think, assign and establish the true and reasonable limits of the doctrine. Shipments made by an enemy's house, on account and risk *bonâ fide* and exclusively of a neutral partner or house, are not subject to

(z) In the original, the expression used is not "house," but "domicil." This is manifestly a mistake, for Mr. Ostermeyer's domicile was neutral, and the substitution is important. If what is here said were applied to personal domicile, it would imply an erroneous doctrine.

confiscation as prize of war. And the same principle must apply in the converse case of a partner or agent domiciled in the enemy's country, and making shipments to his neutral house or principal on the exclusive account of the latter (*a*).

The property of a house of trade established in the enemy's country is liable to condemnation, whatever may be the domicile of the partners. The trade of such a house is deemed essentially hostile trade, and the property engaged in it is therefore treated as enemy's property, notwithstanding the neutral domicile of any of the partners (*b*). In the case of the *San Jose Indiano*, goods were shipped by Dyson Brothers, and Co., of Liverpool, by order, for account of, and consigned to Dyson Brothers, and Finney, of Rio de Janeiro. The houses at Liverpool and at Rio were composed of the same persons, all native subjects of Great Britain, Dyson being domiciled at Rio, and the two others in England. The property was condemned, two-thirds as the property of British subjects domiciled in England, and the remaining third as the property of a person connected in a house of trade in the enemy's country, and continuing that connection after and during the war; the property having been purchased and shipped on account and risk of the same house (*c*).

But where a shipment was made by a house of trade in the enemy's country to a house of trade in a neutral country, *bonâ fide* on the account and risk of the neutral house, restitution was decreed; and it was held, that the identity of the two houses was immaterial (*d*). Where a neutral claimant had shipped in time of peace, on board a ship sailing under the Dutch flag and pass, goods documented as Dutch property, having assumed the character of a Dutchman for the purpose of avoiding particular duties, restitution was decreed. A great

(*a*) *San Jose Indiano*, 2 Gallison, U. S. 283.

(*b*) *The Friendschaft*, 4 Wheaton, 105.

(*c*) *San Jose Indiano*, 2 Gallison, 268.

(*d*) *The Antonia Johanna*, 1 Wheaton, 159.

distinction has always been made by the nations of Europe between ships and goods. Some countries have gone so far as to make the flag and pass conclusive on the cargo also; but this country has never carried the principle to that extent. It holds the ship bound by the character imposed upon it by the authority of the government from which all the documents issue; but goods which have no such dependence upon the authority of the state may be differently considered. It is every day's practice to make such distinctions. In the cases of the Swiss, who had shipped property from Curaçoa under Dutch names to avoid the alien duties, they obtained restitution of their claims. Had the trade in the present instance been an exclusive trade, it might have been questionable how far the party could have been held to the Dutch character, merely on account of a false representation practised against the Dutch revenue laws, unless, indeed, it had appeared that there had been some pass or license conferring on him the special privileges of a Dutch merchant, or unless it was a trade arising out of the circumstances of war, or the expectation of such an event. It would have been going farther than the Court has hitherto gone to declare, that the claimant was to be held to all the revolutions that may attend the Dutch character. It was unnecessary to decide what considerations might be fit to be applied to such transactions in time of war, as this case arose altogether in time of peace, and without any expectation of war (*e*).

Thirdly. Of the national character of ships. Where there is nothing particular or special in the conduct of the vessel itself, its national character is determined by the residence of the owner (*f*). Though a vessel be documented as a neutral vessel, it will not be protected by its documents, if the domicile of the owner is hostile. A government may grant the privilege of a national character to vessels for the purposes of its own

(*e*) The *Vreede Scholtys*, 5 Rob. 5, (π).

(*f*) *Per Cur.* The *Vigilantia*, 1 Rob. 13.

navigation, but cannot change the national character of a vessel to the prejudice of third parties (*g*). But a ship cannot change its character in transitu. Where the owner is an enemy when the vessel sails, he will not be entitled to restitution where he becomes a subject before capture (*h*). The legal title to a ship can be asserted in the Prize Court, as to those persons only, to whom a bill of sale regularly conveys it. Whatever equitable interest exists in other persons is immaterial; the Court looks singly to the bill of sale as a document, which is recognised by the law of nations, and the ownership must be decided by it. It is, as Sir William Scott observes, the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only by the law of England. Where a bill of sale was produced, by which the legal property of the ship was vested solely in a person domiciled in the enemy's country, the ship was condemned as enemy's property, without regard to the neutral domicil of some of the partners in his house of trade (*i*). A bill of sale on board, and a sentence of condemnation in a Prize Court, are sufficient to establish a good title in all ordinary cases of prize (*j*). Where a vessel has been captured and carried into a port of the enemy, a strong ground of presumption is laid that the right of the former proprietor has in fact been legally divested in a regular and effective manner, for the presumption is, that being so carried, the vessel was subjected to a legal condemnation (*k*). A distinction was formerly taken between captured vessels carried into a neutral port, and those carried into an enemy's port: in the former case the presumption was held to be in favour of the former

(*g*) *The President*, 5 Rob. 277.

(*h*) *Nogotie en Zeewaart*, cited in the *Danckchaar Africaam*, 1 Rob. 107.

(*i*) *San Jose Indiano*, 2 Gallison, U. S. 283; *The Sisters*, 5 Rob. 159.

(*j*) *Per Cur.* *The Countess of Lauderdale*, 4 Rob. 286; *Valin Tr.* iv. 4, iv.

(*k*) *Per Cur.* *The Countess of Lauderdale*, 4 Rob. 283; *The Cornelia Edw.* 244.



owner (1); but the validity of this distinction may be questioned, since the practice of condemning vessels carried into a neutral port has been generally adopted, and has been reluctantly recognised.

With regard to the circumstances, that are requisite to change the property of prize ships, the better opinion and practice seems to have been, that a prize should be brought *infra præsidia* of the capturing country or to ports or places of security belonging to an ally in the war. In later times, an additional formality has been required, that of a sentence of condemnation in a competent Court decreeing the capture to have been rightly made, *jure belli*; it not being thought fit in civilized society, that property of this sort should be converted without the sentence of a competent Court pronouncing it to have been seized as the property of an enemy and to be now become, *jure belli*, the property of the captor. The purposes of justice require, that such exercises of war should be placed under public inspection; and, therefore, the mere *deductio infra præsidia* has not been deemed sufficient. No man buys under that title, he requires a sentence of condemnation, as the foundation of the title of the seller; and when the transfer is accepted, he is liable to have that document called for as the foundation of his own. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation for bringing the property, upon which it is to pass, into the country of the captor. For a legal sentence must be the result of legal proceedings in a legitimate Court armed with competent authority upon the subject-matter and upon the parties concerned; a Court which has the means of pursuing the proper inquiry and enforcing its decisions. These are principles of universal jurisprudence applicable to all Courts, and more peculiarly to those which, by their constitution, in all countries must act

(1) *The Constant Mary*, 3 Rob. 97, (n).

in rem upon the substance of the thing acquired and upon the parties, one of whom is not subject to other rights than those of war and is amenable to no jurisdiction, but such as belongs to those who possess the rights of war against him. Upon principle, therefore, it is not to be asserted, that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa* is not within the possession of the Court, and possession in such cases founds the jurisdiction. Over the captors the authority of the Court is complete, on account of their personal relation to the belligerent country. The neutral government may be called upon in the usual mode of requisition known to the law and practice of nations to enforce upon them the orders and decrees of the state to which they belong. But over the other parties, who are not subjects either of the neutral or belligerent state, the belligerent state has not the means of exercising the rights of war over them directly, and cannot call upon the neutral state so to do. The neutral state has nothing to do with the rights of force possessed by the one belligerent against the other; it has nothing to do with the enforcement or consummation of such rights; it owes to both parties the simple rights of hospitality, and even these are very limited in the practice of most civilized states. By the regulations of France, foreign ships are forbidden to enter with prizes into a port of France, except in case of distress, and then they are permitted to stay no longer than their necessity exists. Valin observes, upon this article, that it cannot be doubted, that such a rule is exactly conformable to the laws of neutrality. At any rate, the neutral state can have no compulsory jurisdiction to exercise upon either party upon questions of war depending between them; nor can any such jurisdiction be conveyed to it by the authority of one of them. Its own duties of neutrality prevent the acceptance of any belligerent rights; it cannot be called upon by requisition to give any facility or convenience to the one party to the prejudice of the other, much less to

apply modes of compulsion to the one to serve the hostile purposes of the other. But the practice of our Courts has not confined the jurisdiction of prize to cases of prize brought to the ports of the capturing country, or of an ally in the war, which as to the operation of the common war *unam constituunt civitatem* with the belligerent. It was, therefore, held, that the British Court of Admiralty is bound against the true principle by the practice, which it had not only admitted but applied. The observation of Bynkershoek, that in the conduct of war, you must hold that to be lawful to your enemy which you practise yourselves, a rule true in all instances is not more true in any instance than in one, in which the rights and interests of other countries, being neutral, are so directly concerned. Consequently the sentence of a Prize Court was held not to be invalidated by the circumstance of its having been passed upon a vessel lying in a neutral port (*m*). The Lords of Appeal affirmed the decision of the Court of Admiralty, on the ground that neutrals are sufficiently confirmed in their title by the practice, which has prevailed amongst ourselves; for there could be no equity, on which we could deny the validity of that title to neutrals purchasing of the enemy, at the same time, that they were invited to take it from ourselves (*n*). The same doctrine prevails in France and in the United States of America (*o*). But the property is not changed without a legal condemnation (*p*). By the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and a neutral purchaser in Europe, during war, looks to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel. Hence, condemnations by consular Courts of

(*m*) *The Henrick and Maria*, 4 Rob. 43; *The Comet*, 5 Rob. 285; *Purissima Conception*, 6 Rob. 45.

(*n*) *Henrick and Maria*, 6 Rob. 138, (*n*).

(*o*) *Kent Comm.* i. 98.

(*p*) *Nostra Señora de los Angeles*, 3 Rob. 287.

the enemy sitting in a neutral country are altogether invalid, except as against the enemy's subjects (*q*). So where a vessel is condemned by a Court that has no jurisdiction (*r*). But where a vessel was purchased under an invalid condemnation, and had passed through several hands, and was afterwards condemned, upon the circumstance of the original capture, by a competent tribunal, before the illegal sentence had been impeached; it was held, that the valid sentence operated by relation to rehabilitate the former title, and the title passing from the original purchaser to a neutral claimant was sustained (*s*). So, where a vessel purchased before condemnation was afterwards condemned by a competent tribunal (*t*). But the sentence of a Court of original and appellate jurisdiction, which merely affirms the sentence of a consular or other Court, not having any jurisdiction in matters of prize, is as invalid as the sentence which it affirms, and will not sustain the title of a neutral purchaser (*u*). The sentence of a competent tribunal, however unjustifiable or erroneous, is conclusive of title in all foreign Courts, for the grounds of the sentence cannot be examined by any Court of co-ordinate jurisdiction (*v*).

The title of a neutral vendee to a merchant vessel, sold by the enemy in time of war is valid, where the property is *bonâ fide* and absolutely transferred, so as to divest the enemy of all future interest in it (*w*). There have been cases of merchant vessels driven into ports out of which they could not escape and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase has

(*q*) *Flad Oyen*, 1 Rob. 134; *The Kierlighett*, 3 Rob. 96.

(*r*) *The Thomas*, 1 Rob. 322.

(*s*) *The Falcon*, 6 Rob. 194.

(*t*) *Williams v. Armroyd*, 7 Cranch, 423.

(*u*) *The Kierlighett*, 3 Rob. 96.

(*v*) *Williams v. Armroyd*, 7 Cranch, 423.

(*w*) *The Sechs Geschwistern*, 4 Rob. 100.

been sustained (x). But a belligerent is justified in enforcing such rules, as reason and common sense suggest, to guard against collusion and to enable it to ascertain as much as possible, that the enemy's title is absolutely and completely devested (y). Such purchases are always obnoxious to much suspicion, even when made under commission from neutrals resident in their own country. The suspicion will be still further increased, where it appears that the pretended neutral purchaser was resident in the enemy's country. Under such circumstances, where the only evidence of the genuineness of the transaction consisted of a formal bill of sale, a receipt for part payment of the purchase-money and a note of the master for the payment of the residue, of which the signatures were genuine, but no other evidence was produced; the evidence was held not sufficient to prove a *bonâ fide* sale (z). Anything tending to continue the interest of the enemy vitiates the contract altogether; to be valid, the sale must be absolute and unconditional. Where a vessel had been transferred to a neutral claimant under a condition to reconvey at the end of the war, the sale was held to be invalid, and the vessel was condemned (a). Where the contract for the sale of a vessel, recited, that the seller was bound to his government under a penalty not to sell, unless under a condition of restitution at the end of the war, and the neutral purchaser had undertaken to exonerate the vendor: it was held, that the transfer was collusive; that looking to the control, which the enemy's government and the vendor still retained over the property, it was impossible to hold, that all the interest of the enemy was completely devested, and the ship was condemned (b). Where a vessel is purchased from the enemy by agents in the

(x) *Per Cur. Minerva*, 6 Rob. 399.

(y) *Sechs Geschwistern*, 4 Rob. 101.

(z) *The Bernon*, 1 Rob. 101.

(a) *The Noydt Gedart*, 2 Rob. 137, (n).

(b) *The Sechs Geschwistern*, 4 Rob. 100.

enemy's country under commission from a neutral, the letter of procuration must be exhibited. It is not sufficient for a person to go before a magistrate and declare before him the commission under which he acts. It must be shewn by proper documents that the agent was legally authorized to make the purchase (c). Where a vessel asserted to have been transferred is continued under the former agency and in the former habits of trade, these circumstances furnish conclusive evidence against the genuineness of the transfer (d). The purchase of a ship of war of the enemy by a neutral, while she was lying in a port, to which she has fled for refuge, is invalid. Nothing short of the acquiescence of the belligerent, in the measures of precaution taken to prevent such a vessel from finding her way back again into the navy of her own country, can give validity to such a purchase.

Where a Dutch ship of war, with eighteen guns and ammunition, of which fourteen guns and the ammunition had been taken out for convenience, lying in the port of Bergen, into which she had been chased by a British frigate, and had there remained sealed for nearly three years, was purchased by a Sovereign Prince, Count Bentinck, Lord of Knipphausen, and was captured on her way to Holland under Knipphausen colours with a Dutch master and crew; she was condemned (e).

The national character of a ship is not affected by any liens arising from private contracts, or by any liability of the owner. Where a claim was given on behalf of the former proprietor of a ship, in virtue of a lien, which he was said to have retained on the property for the payment of the purchase money; it was held, that such an interest is not sufficient to sustain a claim of property in a Court of Prize; and the same doctrine prevailed, where a claim was made in respect of a bottomry bond, given fairly in time of peace to relieve a ship

(c) *The Argo*, 1 Rob. 158.

(d) *The Omnibus*, 6 Rob. 71; *The Jemmy*, 4 Rob. 31.

(e) *The Minerva*, 6 Rob. 396.

in distress, and without a view of infringing the rights of war. A Court of Prize cannot recognise liens or bonds of this kind, so as to give persons a right to stand in judgment and demand a restitution of such interests. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make a seizure. The fairest and most credible documents declaring the property to belong to the enemy would only serve to mislead them, if such documents were liable to be overruled by liens, which could not in any manner come to their knowledge. It would be equally impossible for the Court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence, which prevail in different countries. To decide judicially upon such claims would require of the Court a perfect knowledge of the law of covenant, and the application of that law in all the countries under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple question of property. It is a matter solely for the consideration of the person, who sells, to judge, what mode of payment he will accept. He may consent to take a bill of exchange, or he may rely on the promissory note of the purchaser, which may not come in payment for a considerable time, or may never be paid. The Court will not look to such contingencies. It is sufficient that the mode of payment, whatever it is, has been accepted, and that a legal transfer has been made (*f*). So a person advancing money on a bottomry bond acquires by that act no property in the vessel; he

(*f*) *The Maryanna*, 6 Rob. 24.

acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a Court of justice. The property of the vessel continues in the former proprietor, who has given a right of action against it and nothing more. If there is no change of property, there can be no change of national character. Those lending money on such security, take it, subject to all the chances incident to it, and amongst the rest the chances of war. But it has been said that the captor takes *cum onere*; and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply, where the *onus* is immediately and visibly incumbent upon it. A captor, who takes the cargo of an enemy on board the ship of a friend, takes it, liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. By that law he is not bound to part with it, but on payment of freight; he being in possession, can detain it by his own authority, and wants not the aid of any Court for that purpose. These are all characters of the *jus in re* of an interest directly and visibly residing in the substance of the thing itself. But it is a proposition of a much wider extent, which affirms, that a mere right of action is entitled to the same favourable consideration in its transfer from the neutral to a captor. It is very obvious, that claims of such a nature may be so framed as that no powers belonging to a Court of Prize can enable it to examine them with effect. They are private contracts passing between parties, who have an interest in colluding, the captor has no access whatever to the original private understanding of the parties in forming such contract; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties; in like manner his rights operate upon no such liens, where the property itself is



protected from capture. Indeed it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral; the consequence, therefore, of allowing the privilege claimed would be, that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claim upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. A Prize Court, therefore, excludes all consideration of liens or incumbrances of this species (*g*).

Circumstances arising from the conduct of a vessel may fix upon it a national character, without regard to the domicile of its owner. It is a known and established rule with regard to a vessel, that if she is navigating under the pass of a foreign country, she is considered as having the national character of that nation, under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country (*h*). A vessel sailing under the colours and pass of a nation, though adopted in time of peace, and not in contemplation of war, is considered as clothed with the national character of that nation. Ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest, which persons living in neutral countries may actually have in them. This principle was strongly recognised in the case of a ship taken on a voyage from Surinam to Amsterdam, and documented as a Dutch ship. Claims were given for specific shares on behalf of persons resident in Switzerland; and one claim was on behalf of a lady, to whom a share had devolved by inheritance. In that case it was held, that sailing under a Dutch flag and pass

(*g*) *The Tobago*, 5 Rob. 218.

(*h*) *Per Cur.* *The Vigilantia*, 1 Rob. 13; *The Diana*, 5 Rob. App. 2; *The Ariadne*, 2 Wheaton, 143; *The Caledonia*, 4 Wheaton, 100.

was decisive against the admission of any claim; and it was observed, that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such a character, without being subject at the same time to the inconveniences attaching to it (i). By assuming the flag and pass of a foreign state, persons expose themselves to a double disadvantage. It is a known rule of law, that when parties agree to take the flag and pass of a foreign country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to obtain the benefit of their real character. They are likewise subject to this further inconvenience, that their real character may be pleaded against them by others. Thus, when a ship was sailing under the Swedish flag and pass, and was engaged in a trade lawful only for a ship entirely Swedish, and one-half the ship belonged to British owners, she was condemned (k). So where a ship was sailing under the flag and pass of Portugal, but was proved by papers found concealed on board to be a Spanish ship (l). So where a Dutch vessel was sailing under the flag and pass of Kniphausen (m). / So the employment of a vessel may impress upon her a national character. Thus, the carrying military persons to the colony of the enemy, who are there to take upon them the exercise of their military functions, will lead to condemnation; and the Court will not scan with minute arithmetic the number of persons that are so carried. The number of persons alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To

(i) *The Elizabeth*, 5 Rob. 2; *The Vreede Scholtys*, 5 Rob. 5, (n).

(k) *The Success*, 1 Dod. 131.

(l) *The Citade de Lisboa*, 6 Rob. 358.

(m) *Ibid.* (n).

send out one veteran general to take the command of forces, might be a more noxious act than the conveyance of a whole regiment. If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention. The ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as force against those who have imposed upon him. In cases of *bonâ fide* ignorance, there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent the right of preventing the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practised, it operates as force, and if redress in the way of indemnification is to be sought against any person, it must be against those, who have by means, either of compulsion or deceit, exposed the property to danger. Otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible in the greater number of cases to prove the knowledge and privity of the immediate offender (*n*). Where a ship is fitted out in the enemy's port, and destined to return to the enemy's port, in a trade to which foreigners are admitted only on those conditions; the ship and cargo are liable to confiscation, as engaged in a course of trade exclusively hostile (*o*). Upon the same principle it has been held, that the property of British merchants, even when shipped before the war, in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects, that no foreign name could appear in it, must take the consequences of that character, and be considered as Spanish property (*p*). So where a ship was let under contract with the enemy's government to bring home a number of military persons in the

(*n*) *The Orozembo*, 6 Rob. 430.

(*o*) *Per Cur.* *The Juliana*, 4 Rob. 342.

(*p*) *The Princessa*, 2 Rob. 49.

service of the enemy (*q*). So where a ship had been altogether left in the hands of the enemy's merchants, and employed for seven voyages successively in the enemy's trade (*r*). If a neutral, from views of interest, choose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation. Though he may have no sea port of his own the ports of other neutral countries are open to him, and if he confines his vessel exclusively to the enemy's navigation, he is liable to be considered as an enemy (*s*). So, where a Dutch fishing vessel, purchased by a neutral, continued to be engaged in the Dutch Greenland trade, she was held to be a Dutch vessel (*t*). So, a vessel claimed by neutrals, but engaged in the Dutch fishing trade between the Doggerbank and the ports of Holland, was held to be a Dutch vessel (*u*). A privilege is allowed to the Swiss, in common with some of the interior countries of Germany, of carrying on trade through the ports of the enemy, in consideration of the hardships they would sustain, were they to be altogether restricted from becoming merchants for the supply of their own wants, or for the export of the manufactures and native produce of their own country. But this privilege does not extend to such a merchant interposing without reference to the wants of his own country to carry on the trade of the enemy (*v*). Neutral ships are not allowed to trade on freight between the ports of the enemy (*w*); nor to clear out from the port of a belligerent to the port of his enemy (*x*).

(*q*) *The Friendship*, 6 Rob. 420.

(*r*) *The Jonge Emilia*, 3 Rob. 52.

(*s*) *The Endraught*, 1 Rob. 19.

(*t*) *The Embden*, 1 Rob. 16; *The Vigilantia*, 1 Rob. 1.

(*u*) *The Young Jacob*, 1 Rob. 19.

(*v*) *Per Cur.* *The Magnus*, 1 Rob. 31.

(*w*) *Per Cur.* *Emanuel*, 1 Rob. 302.

(*x*) *Per Cur.* *The Sansom*, 6 Rob. 414.

With regard to the coasting trade (supposing it to be a trade not usually opened to foreign vessels), there cannot be described a more effectual accommodation that can be given to an enemy during a war, than to undertake it for him during his disability. The British Courts have not gone so far as to say, that a single voyage of that kind would be sufficient to fix a hostile character upon a vessel, but a habit of such trading would have that effect (*y*). A single voyage, without fraud, only entails the forfeiture of freight and expenses (*z*). Carrying on the coasting trade with false papers is a ground of condemnation (*a*). So where a cargo was carried from one port of the enemy to another, with a fraudulent destination to a neutral port (*b*).

As to mariners, the general rule is, that they are to be characterized by the country in whose service they are employed. Thus, where a neutral was owner and master of a ship, and constantly employed in navigating between the ports of Holland, it was held that he was liable to be considered as a Dutchman, and that not only in respect to the particular vessel in which he was employed, but also in respect to other vessels belonging to him that had no distinct national character impressed upon them (*c*). So the master of a ship who had been employed constantly for ten years in the Dutch Greenland trade, was held by such an occupation to be divested of his native character, and to become a Dutchman by adoption (*d*); and such a person's native character is not retained by the residence of his wife and family in his own country (*e*).

(*y*) *Per Cur.* The Welvaart, 1 Rob. 124; and *vide* The Speculation, 2 Rob. 296.

(*z*) The Emanuel, 1 Rob. 296; The Atlas, 3 Rob. 304; The Wilhelmina, 2 Rob. 101, (*n*); The Allegoria, 4 Rob. 202, (*n*).

(*a*) The Johanna Tholen, 6 Rob. 72.

(*b*) The Ebenezer, 6 Rob. 250; The Convenientia, 4 Rob. 201.

(*c*) The Vriendschap, 4 Rob. 166.

(*d*) The Emlden, 1 Rob. 17.

(*e*) The Endraught, 1 Rob. 23.

So where the master of an enemy's whale ship claimed specific shares of the cargo, as the property of himself and the officers and crew of his vessel, asserted to be neutral subjects, the Court held that they were to be considered as mariners, and this proportion of the proceeds of the voyage as their wages ; that a claim could not be sustained for wages on board an enemy's ship ; and that there was less reason for any relaxation of the general principle in this branch of navigation than in any other, because the ratio of wages is a material part of the trade itself, being the ordinary mode of carrying on that particular species of commerce (*f*).

Fourthly. Of the national character of goods. The national character of goods follows the national character of the proprietor, which has been already discussed ; but the rules that determine the legal title in time of war remain to be considered. Shipments made from an enemy's country in an enemy's vessel, are presumed to be enemy's property (*g*). The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect ; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice that presupposes an agreement amongst such a description of merchants. In time of profound peace, when there was no prospect of approaching war, there would unquestionably be nothing illegal in contracting, that the whole risk should fall on the consignor till the goods came into the possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not ; it would not be at all illegal, that goods not shipped in time of war or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea ; the risk would in all cases be laid on the consignor, when it suited the

(*f*) *The Frederick*, 5 Rob. 8.

(*g*) *San Jose Indiano*, 2 Gallison, U. S. 302.

purpose of protection: on every contemplation of war this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war. Or to express it more accurately, it is a contract which, if made in war, has this effect: that the captor has the right to seize the property and convert it to his own use, for he having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy; and a shipper, who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risks, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment and throws the loss upon the shipper, he must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution. The true criterion of property is, that if you are the person on whom the loss will fall, you are to be considered as the proprietor. Thus, where a shipment was made during peace, and not in contemplation of war, according to a course of trade by which a credit of six, nine, or twelve months was usually given, and it was not the custom to draw upon the consignee till the arrival of the goods, and the sea risk was on the consignor who insured, and had no remedy against the consignee for any accident happening during the voyage; and by the bill of lading the delivery appeared not to have been made to the master for the consignee, but the goods were to remain the property of the shipper till delivery to the consignee; it was held, that to make the loss fall upon the shipper in such a case would be harsh in the extreme. He had shipped his goods in the ordinary course of trade by a lawful agreement, in nowise injurious to the right of any third

party. If he were to be a sufferer, he would be a sufferer without notice, and without the means of securing himself; he was not called upon to know that war would occur before the delivery of his goods. The consignee might refuse payment, because, by the terms of a contract made when it was perfectly lawful, the goods were to be at the risk of the shipper till delivery, and they had not been delivered; accordingly, it was held that the legal property was in the shipper, and restitution was decreed (*h*). Where a contract made before war, and without any contemplation of war, is carried into execution by a shipment after the breaking out of hostilities, the ground, on which a distinction is made in favour of such contracts, no longer exists (*i*).

In the ordinary course of things in time of peace, a transfer in transitu may be effectually made. It cannot be doubted, that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties and all others. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held, that the property shall be deemed to continue, as it was at the time of shipment, till the actual delivery. This arises out of a state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. It is, on this principle, held as a general rule, that property cannot be converted in transitu; but this arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating in time of peace. Where goods consigned by a Spanish to a Dutch merchant, which would have been liable to confiscation either as Dutch or Spanish property, had been transferred in

(*h*) *The Packet de Bilbao*, 2 Rob. 133.

(*i*) *The Anna Catherina*, 4 Rob. 107.



transitu to a neutral claimant in time of peace, and without contemplation of war, restitution was decreed (*k*); but in time of war property cannot change its character in transitu. Thus, property sailing after declaration of hostilities, but before a capitulation, is not protected by the intermediate capitulation. Where a ship and cargo sailing from a colony of the enemy to the mother country was claimed by those who had become subjects by capitulation before the capture, they were held not to be entitled to restitution (*l*). In time of war, property cannot be legally transferred or change its character in transitu. And a mere transshipment will not break the continuity of the voyage; and goods, after transshipment, will be liable to be considered in the same light, as if they had been taken in transitu on their original destination (*m*). So where a neutral having shipped goods by order and on account and risk of the enemy, who refused to accept, consigned them *bonâ fide* to the neutral claimant. The shippers might have forced the goods on the consignee, and might have compelled them to accept and pay. But they did not exercise this right; they took the goods to themselves again, in order to sell them to another person, and by that act the goods had become again the property of the shippers. Then comes the question, whether the goods of an enemy can be transferred in transitu. After the numberless cases in which the question has been determined, it is not now an arguable point. In time of peace, when the rights of third parties do not intervene, there may be no objection to the validity of a transfer of this kind; but in time of war it would open a door to fraud, against which Courts of justice could never be effectually protected, and therefore it has been prohibited. This being a transfer of property from the enemy in transitu, the goods must be con-

(*k*) *Vrouw Margaretha*, 1 Rob. 336.

(*l*) *The Danckebaar Africaan*, 1 Rob. 107.

(*m*) *Carl Walter*, 4 Rob. 207; *Danckebaar*, 1 Rob. 112.

demned as still belonging to the enemy (*n*). So contracts of transfer in transitu, made in contemplation of war, are invalid. It cannot be said that all engagements in the proximity of war, into which the speculation of war may enter, as, for instance, with regard to prize, are therefore invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense; but if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, which would not otherwise be entered into on the part of the seller; and this is known to the purchaser, though on his part there may be other concurrent motives, such a contract cannot be held good, on the same principle that operates to invalidate a transfer in transitu in time of actual war. The motives, indeed, may be difficult to prove, but that will be the difficulty of particular cases. Supposing the fact to be established, that it is a sale under an admitted necessity arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred on account of the fraud on belligerent rights, the same fraud is committed against the belligerent, not indeed as an actual belligerent, but as one who was in the clear expectation of both parties likely to become a belligerent before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war, not indeed, in either case, from capture at the present moment, when the contract is made, but from the danger of capture when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis; in other words, both are done for the purpose of eluding a belligerent right either present or expected. Both contracts are framed with the same *animo fraudandi*, and are justly

(*n*) *The Twende Venner*, 6 Rob. 329.

subject to the same rule. Upon the general ground also of guarding against fraud, it is equally necessary to apply the same rule to antecedent contracts of this nature. Upon this principle, a contract made before the commencement of hostilities, and assumed to be *bonâ fide*, being made in transitu for the purpose of withdrawing the property from capture, was held to be null and invalid (*n*).

In time of war, or in the case of shipments made in contemplation of war, goods going to an enemy to become his property on arrival, where the consignor is not at liberty to exercise any act of ownership to prevent the delivery, are considered, during the transit, the property of the enemy (*o*); in other words, where the contract is absolute and indefeasible, the property, during transit, is considered the property of the consignee (*p*).

On the other hand, where the contract is defeasible, where the consignor can exercise any act of ownership to prevent the delivery (*q*), or the consignee is not under a legal obligation to accept the goods on their arrival, they are considered, during transit, to be the property of the consignor (*r*).

In the case of the *Sally*, Griffiths, a cargo shipped from America ostensibly on the risk of the consignors, was proved to have been consigned to the French government, to be sent as American property to Havre, with power to the French government to send the ship to another port on payment of freight. The Court held, that it had always been the rule of Prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken in transitu, is to be considered as enemy's property. Where the contract is made in time of peace, and without any contemplation of war, no such rule

(*n*) *The Jan Frederick*, 5 Rob. 128.

(*o*) *The Anna Catharina*, 4 Rob. 107.

(*p*) *The Atlas*, 3 Rob. 299.

(*q*) *The Aurora*, 4 Rob. 218.

(*r*) *The Cousine Maryanne*, Edw. 346.

exists; but where the form of the contract is framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. Where goods are to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property (*t*). So where an American cargo, consigned to the master for sale, was sold at Vigo to the Spanish government under a contract of the master to deliver at Seville at his own risk, and there to receive payment, it was held that the cargo, going to an enemy's port, there to be delivered there to the enemy, and to be paid for by him, having actually become his property under an engagement to that effect by the master, who was the appointed agent for the management of the cargo, could be considered in no other light than as enemy's property; that the contract, under which it went, was absolute and indefeasible; and the cargo was condemned (*u*). So where a cargo was described in the ship's papers as going to take chance of the market, but it appeared, that it was to be imported into Spain, there to be delivered to the custom-house in payment for tobacco, afterwards to be delivered under a monopoly granted to the importers by the Spanish government; it was held that the cargo would become the property of the Spanish government immediately upon arrival, that the government was entitled to possession, and that it was only on the violation of the contract on the part of the Spanish government, that the goods were to take the chance of the market. The shippers considered themselves bound to deliver them for the use of the Spanish government under the agreement, as entitled to the benefit and subject to the obligations of the contract. It was attempted

(*t*) *The Sally*, 3 Rob. 300, (*u*).

(*u*) *The Atlas*, 3 Rob. 299.

to distinguish this case from the *Sally, Griffiths*, by the circumstance that the delivery was to be made to an agent of the shippers, and not to the custom-house; but that was held to be immaterial, because the agent, being bound to hand them over to the custom-house on delivery to him, delivery could not be considered in any other light, than as a delivery to the custom-house itself. Then, it was said, that the goods did not correspond with the enumeration in the agreement, and were not contract goods; and, consequently, without any violation of public faith, the acceptance of them was merely optional and contingent. But it was held, that it was not open to the parties to make this averment; when it appeared from their own letters that they relied on the clear and absolute obligation of the Spanish government to take them, as such. The letters described the goods to be such, as had been before sent under the contract, and about which no difficulty had been made; they expressed a confident expectation that they would be received as such, being no other deviations, than such as had been permitted under the common understanding of the parties in all former transactions under that contract, and that they could not be rejected, but under an act, which would amount to a total surrender of national faith. After this, the parties were not at liberty to say, that they were not contract goods; any more than the claimant in the *Sally, Griffiths*, could have been heard to aver, that the flour was not of that quality, which that contract required. Where the goods are sent under a contract by the party, it cannot be permitted to the claimant himself to aver, that the goods so sent are not contract goods. In all such cases, whether expressed or not, it is the common understanding of the parties, that the goods to be entitled to the benefit of the contract must answer the description; and it shall not be permitted, that he who sends the goods with such a claim, shall be heard to maintain that they do not answer that description. On these grounds, it was held that these

goods in transitu were the property of the Spanish government (v).

Where goods were shipped by order on account and risk of the consignee, but delivery was countermanded on erroneous information of his insolvency, it was held that the property of the consignee was not devested. The rule is, that when a vessel is chartered by the consignor, and goods are put on board, those goods are considered in transitu; and when the consignor has not received payment, he has a right to stop and devert the delivery of the goods, and has what Lord Mansfield calls a proprietary lien upon them,—a privilege recognised by the general law as well as by our own, more especially by the French law, which allows the *vendeur primitif*, as he is termed, to protect himself against nonpayment by the seizure of the goods. If the consignee in this case had been an insolvent person, the revocation would have amounted to a complete and effective revindication of the goods; but if he is not insolvent, if, from misinformation or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to a delivery of the goods, with an indemnification for the expenses that may have been incurred. It is not an unlimited power, that is vested in the consignor to vary the consignment at his pleasure; it is a privilege, that is allowed for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary, that the consignee should be actually insolvent at the time. If the insolvency actually happens before the arrival, it would be sufficient to justify, what has been done; and to entitle the shipper to the benefit of his provisional caution. But if the consignee is not insolvent, and has actually provided for the payment, he will be entitled to the delivery.

Where goods are shipped without orders, the shipper has an unlimited right to vary the consignment at pleasure. He retains an absolute power over them, for there is no purchase. But when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the peculiar case, in which he is again re-instated by the privileges of the *vendeur primitif*. The mercantile law is clear and distinct, that the seller has not a right to vary the consignment, except in the case above stated. The mischief and inconvenience that would ensue on a contrary supposition are extreme. The goods might be put on board and might lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object that might be eventually defeated at any moment by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller. Persons, having accepted orders and made the consignment, have no right to vary that consignment, except in the sole case of insolvency (*w*). Goods shipped in pursuance of the consignee's orders, and consigned to him or to his agent, are his property, and it is immaterial whether they be purchased for cash or credit, or insured in the enemy's country or elsewhere. Where goods were ordered by a partnership, and the consignor at the moment of shipment, received information that the partnership was dissolved, and therefore shipped to a third party to the use of the consignees, the goods were held to be the property of the consignees during their transit (*x*). Where goods were shipped in pursuance of orders, and consigned to the agents of the consignor with a bill of lading in the name of

(*w*) *The Constantia*, 6 Rob. 321.

(*x*) *The Merrimack*, 8 Cranch, 327.

the purchaser, together with a letter, which contained these words, "as there may have been some alteration in some of our friends, shipping them to you gives the power of keeping back to you;" Chief Justice Marshall and three of the Judges of the Supreme Court of the United States held, that the agent was bound to deliver the goods, except in case of the insolvency of the purchaser; that the circumstance of the goods being at the risk of the consignor during the voyage was immaterial, and that the goods in transitu were the property of the purchaser. Mr. Justice Story and two other Judges held, that the agent had the power to withhold the goods, unless he was satisfied of the perfect solvency of the purchaser and might exercise his discretion respecting it; that the loss would have fallen on the shipper, if the goods had been lost during the voyage, and that his property was not devested (*y*).

Where a cargo was shipped for the order of the shippers, consigned to a house in London, being the correspondents both of the shipper and of the purchaser, who were to suffer it to go on to the purchaser in Ireland, if they were satisfied for the payment, it was held, that the cargo was still under the dominion of the shipper and subject to his order, and that the property was not changed (*z*). Where silver was shipped to the agent of the shipper to answer the credit of the agent of the claimant, but no document passed from the shipper or his agent giving them the controul over it; it was held, that the appropriation was revocable, and the property must be taken to be in the shipper (*a*). So, where the claimant had sold a ship to the consignor, who had covenanted to supply the necessary goods for payment, and had shipped the goods to the correspondent of the claimant in London, with directions to the consignee to pay over the surplus, if any, to him;

(*y*) The Merrimack, 8 Cranch, 328.

(*z*) The Aurora, 4 Rob. 218.

(*a*) The Josephine, 4 Rob. 25.



it was held, that the property of the consignor was not divested. That goods are going for the payment of a debt will not alter the property; there must be something more. Even if the bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding, that he who holds the bill of lading is to bear the risk of the goods, as to the voyage, and as to the market, to which they are consigned; otherwise, though the security may avail pro tanto, it cannot be held to work any change of the property. The supplying of funds may be a matter of arrangement as to the convenience of the parties, but it can found no title to property, unless it was done with a full transfer of the account and risk at the same time. The consignor consigns the goods to a house in London, and if they had been lost, the loss would have fallen upon him. The claimant could exercise no dominion over them, he could not direct the consignment to be made to the house in London. That the transaction was so conducted was mere matter of convenience and accommodation, but can make no difference as to the principle, on which the question of property is to be considered. No title of property is conveyed to the claimant, but a mere interest in the goods as the transaction stood. Suppose that the consignor had thought proper to pay for the vessel in any other manner, it was clearly in his power to make such provision, and it could not then have been maintained that the claimant retained any interest, much less any title of property in the goods (*b*). Where a shipment was made by a British house on neutral accounts, and it appeared, that before the rupture between France and America, they were used to specify the account and risk of the claimant; but that after that time, when it became unsafe, that American interests should be held forth ostensibly, they introduced the general terms "neutral account" only, and that since that alteration, several ship-

(*b*) *The Maryanna*, 6 Rob. 24.

party. If he were to be a sufferer, he would be a sufferer without notice, and without the means of securing himself; he was not called upon to know that war would occur before the delivery of his goods. The consignee might refuse payment, because, by the terms of a contract made when it was perfectly lawful, the goods were to be at the risk of the shipper till delivery, and they had not been delivered; accordingly, it was held that the legal property was in the shipper, and restitution was decreed (*h*). Where a contract made before war, and without any contemplation of war, is carried into execution by a shipment after the breaking out of hostilities, the ground, on which a distinction is made in favour of such contracts, no longer exists (*i*).

In the ordinary course of things in time of peace, a transfer in transitu may be effectually made. It cannot be doubted, that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties and all others. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held, that the property shall be deemed to continue, as it was at the time of shipment, till the actual delivery. This arises out of a state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. It is, on this principle, held as a general rule, that property cannot be converted in transitu; but this arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating in time of peace. Where goods consigned by a Spanish to a Dutch merchant, which would have been liable to confiscation either as Dutch or Spanish property, had been transferred in

(*h*) *The Packet de Bilbao*, 2 Rob. 133.

(*i*) *The Anna Catherina*, 4 Rob. 107.

transitu to a neutral claimant in time of peace, and without contemplation of war, restitution was decreed (*k*); but in time of war property cannot change its character in transitu. Thus, property sailing after declaration of hostilities, but before a capitulation, is not protected by the intermediate capitulation. Where a ship and cargo sailing from a colony of the enemy to the mother country was claimed by those who had become subjects by capitulation before the capture, they were held not to be entitled to restitution (*l*). In time of war, property cannot be legally transferred or change its character in transitu. And a mere transshipment will not break the continuity of the voyage; and goods, after transshipment, will be liable to be considered in the same light, as if they had been taken in transitu on their original destination (*m*). So where a neutral having shipped goods by order and on account and risk of the enemy, who refused to accept, consigned them *bonâ fide* to the neutral claimant. The shippers might have forced the goods on the consignee, and might have compelled them to accept and pay. But they did not exercise this right; they took the goods to themselves again, in order to sell them to another person, and by that act the goods had become again the property of the shippers. Then comes the question, whether the goods of an enemy can be transferred in transitu. After the numberless cases in which the question has been determined, it is not now an arguable point. In time of peace, when the rights of third parties do not intervene, there may be no objection to the validity of a transfer of this kind; but in time of war it would open a door to fraud, against which Courts of justice could never be effectually protected, and therefore it has been prohibited. This being a transfer of property from the enemy in transitu, the goods must be con-

(*k*) *Vrouw Margaretha*, 1 Rob. 336.

(*l*) *The Dankebaas Africaan*, 1 Rob. 107.

(*m*) *Carl Walter*, 4 Rob. 207; *Dankebaas*, 1 Rob. 112.

demned as still belonging to the enemy (*n*). So contracts of transfer in transitu, made in contemplation of war, are invalid. It cannot be said that all engagements in the proximity of war, into which the speculation of war may enter, as, for instance, with regard to prize, are therefore invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense; but if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, which would not otherwise be entered into on the part of the seller; and this is known to the purchaser, though on his part there may be other concurrent motives, such a contract cannot be held good, on the same principle that operates to invalidate a transfer in transitu in time of actual war. The motives, indeed, may be difficult to prove, but that will be the difficulty of particular cases. Supposing the fact to be established, that it is a sale under an admitted necessity arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred on account of the fraud on belligerent rights, the same fraud is committed against the belligerent, not indeed as an actual belligerent, but as one who was in the clear expectation of both parties likely to become a belligerent before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war, not indeed, in either case, from capture at the present moment, when the contract is made, but from the danger of capture when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis; in other words, both are done for the purpose of eluding a belligerent right either present or expected. Both contracts are framed with the same *animo fraudandi*, and are justly

(*n*) *The Twende Venner*, 6 Rob. 329.

subject to the same rule. Upon the general ground also of guarding against fraud, it is equally necessary to apply the same rule to antecedent contracts of this nature. Upon this principle, a contract made before the commencement of hostilities, and assumed to be *bonâ fide*, being made in transitu for the purpose of withdrawing the property from capture, was held to be null and invalid (*n*).

In time of war, or in the case of shipments made in contemplation of war, goods going to an enemy to become his property on arrival, where the consignor is not at liberty to exercise any act of ownership to prevent the delivery, are considered, during the transit, the property of the enemy (*o*); in other words, where the contract is absolute and indefeasible, the property, during transit, is considered the property of the consignee (*p*).

On the other hand, where the contract is defeasible, where the consignor can exercise any act of ownership to prevent the delivery (*q*), or the consignee is not under a legal obligation to accept the goods on their arrival, they are considered, during transit, to be the property of the consignor (*r*).

In the case of the *Sally*, Griffiths, a cargo shipped from America ostensibly on the risk of the consignors, was proved to have been consigned to the French government, to be sent as American property to Havre, with power to the French government to send the ship to another port on payment of freight. The Court held, that it had always been the rule of Prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken in transitu, is to be considered as enemy's property. Where the contract is made in time of peace, and without any contemplation of war, no such rule

(*n*) *The Jan Frederick*, 5 Rob. 128.

(*o*) *The Anna Catharina*, 4 Rob. 107.

(*p*) *The Atlas*, 3 Rob. 299.

(*q*) *The Aurora*, 4 Rob. 218.

(*r*) *The Cousine Maryanne*, Edw. 346.

exists; but where the form of the contract is framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. Where goods are to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property (*t*). So where an American cargo, consigned to the master for sale, was sold at Vigo to the Spanish government under a contract of the master to deliver at Seville at his own risk, and there to receive payment, it was held that the cargo, going to an enemy's port, there to be delivered there to the enemy, and to be paid for by him, having actually become his property under an engagement to that effect by the master, who was the appointed agent for the management of the cargo, could be considered in no other light than as enemy's property; that the contract, under which it went, was absolute and indefeasible; and the cargo was condemned (*u*). So where a cargo was described in the ship's papers as going to take chance of the market, but it appeared, that it was to be imported into Spain, there to be delivered to the custom-house in payment for tobacco, afterwards to be delivered under a monopoly granted to the importers by the Spanish government; it was held that the cargo would become the property of the Spanish government immediately upon arrival, that the government was entitled to possession, and that it was only on the violation of the contract on the part of the Spanish government, that the goods were to take the chance of the market. The shippers considered themselves bound to deliver them for the use of the Spanish government under the agreement, as entitled to the benefit and subject to the obligations of the contract. It was attempted

(*t*) *The Sally*, 3 Rob. 300, (*u*).

(*u*) *The Atlas*, 3 Rob. 299.

to distinguish this case from the *Sally, Griffiths*, by the circumstance that the delivery was to be made to an agent of the shippers, and not to the custom-house; but that was held to be immaterial, because the agent, being bound to hand them over to the custom-house on delivery to him, delivery could not be considered in any other light, than as a delivery to the custom-house itself. Then, it was said, that the goods did not correspond with the enumeration in the agreement, and were not contract goods; and, consequently, without any violation of public faith, the acceptance of them was merely optional and contingent. But it was held, that it was not open to the parties to make this averment; when it appeared from their own letters that they relied on the clear and absolute obligation of the Spanish government to take them, as such. The letters described the goods to be such, as had been before sent under the contract, and about which no difficulty had been made; they expressed a confident expectation that they would be received as such, being no other deviations, than such as had been permitted under the common understanding of the parties in all former transactions under that contract, and that they could not be rejected, but under an act, which would amount to a total surrender of national faith. After this, the parties were not at liberty to say, that they were not contract goods; any more than the claimant in the *Sally, Griffiths*, could have been heard to aver, that the flour was not of that quality, which that contract required. Where the goods are sent under a contract by the party, it cannot be permitted to the claimant himself to aver, that the goods so sent are not contract goods. In all such cases, whether expressed or not, it is the common understanding of the parties, that the goods to be entitled to the benefit of the contract must answer the description; and it shall not be permitted, that he who sends the goods with such a claim, shall be heard to maintain that they do not answer that description. On these grounds, it was held that these

goods in transitu were the property of the Spanish government (v).

Where goods were shipped by order on account and risk of the consignee, but delivery was countermanded on erroneous information of his insolvency, it was held that the property of the consignee was not divested. The rule is, that when a vessel is chartered by the consignor, and goods are put on board, those goods are considered in transitu; and when the consignor has not received payment, he has a right to stop and divest the delivery of the goods, and has what Lord Mansfield calls a proprietary lien upon them,—a privilege recognised by the general law as well as by our own, more especially by the French law, which allows the *vendeur primitif*, as he is termed, to protect himself against nonpayment by the seizure of the goods. If the consignee in this case had been an insolvent person, the revocation would have amounted to a complete and effective revindication of the goods; but if he is not insolvent, if, from misinformation or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to a delivery of the goods, with an indemnification for the expenses that may have been incurred. It is not an unlimited power, that is vested in the consignor to vary the consignment at his pleasure; it is a privilege, that is allowed for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary, that the consignee should be actually insolvent at the time. If the insolvency actually happens before the arrival, it would be sufficient to justify, what has been done; and to entitle the shipper to the benefit of his provisional caution. But if the consignee is not insolvent, and has actually provided for the payment, he will be entitled to the delivery.



Where goods are shipped without orders, the shipper has an unlimited right to vary the consignment at pleasure. He retains an absolute power over them, for there is no purchase. But when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the peculiar case, in which he is again re-instated by the privileges of the *vendeur primitif*. The mercantile law is clear and distinct, that the seller has not a right to vary the consignment, except in the case above stated. The mischief and inconvenience that would ensue on a contrary supposition are extreme. The goods might be put on board and might lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object that might be eventually defeated at any moment by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller. Persons, having accepted orders and made the consignment, have no right to vary that consignment, except in the sole case of insolvency (*w*). Goods shipped in pursuance of the consignee's orders, and consigned to him or to his agent, are his property, and it is immaterial whether they be purchased for cash or credit, or insured in the enemy's country or elsewhere. Where goods were ordered by a partnership, and the consignor at the moment of shipment, received information that the partnership was dissolved, and therefore shipped to a third party to the use of the consignees, the goods were held to be the property of the consignees during their transit (*x*). Where goods were shipped in pursuance of orders, and consigned to the agents of the consignor with a bill of lading in the name of

(*w*) *The Constantia*, 6 Rob. 321.

(*x*) *The Merrimack*, 8 Cranch, 327.

the purchaser, together with a letter, which contained these words, "as there may have been some alteration in some of our friends, shipping them to you gives the power of keeping back to you;" Chief Justice Marshall and three of the Judges of the Supreme Court of the United States held, that the agent was bound to deliver the goods, except in case of the insolvency of the purchaser; that the circumstance of the goods being at the risk of the consignor during the voyage was immaterial, and that the goods in transitu were the property of the purchaser. Mr. Justice Story and two other Judges held, that the agent had the power to withhold the goods, unless he was satisfied of the perfect solvency of the purchaser and might exercise his discretion respecting it; that the loss would have fallen on the shipper, if the goods had been lost during the voyage, and that his property was not divested (*y*).

Where a cargo was shipped for the order of the shippers, consigned to a house in London, being the correspondents both of the shipper and of the purchaser, who were to suffer it to go on to the purchaser in Ireland, if they were satisfied for the payment, it was held, that the cargo was still under the dominion of the shipper and subject to his order, and that the property was not changed (*z*). Where silver was shipped to the agent of the shipper to answer the credit of the agent of the claimant, but no document passed from the shipper or his agent giving them the controul over it; it was held, that the appropriation was revocable, and the property must be taken to be in the shipper (*a*). So, where the claimant had sold a ship to the consignor, who had covenanted to supply the necessary goods for payment, and had shipped the goods to the correspondent of the claimant in London, with directions to the consignee to pay over the surplus, if any, to him;

(*y*) The Merrimack, 8 Cranch, 328.

(*z*) The Aurora, 4 Rob. 218.

(*a*) The Josephine, 4 Rob. 25.

it was held, that the property of the consignor was not divested. That goods are going for the payment of a debt will not alter the property ; there must be something more. Even if the bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding, that he who holds the bill of lading is to bear the risk of the goods, as to the voyage, and as to the market, to which they are consigned ; otherwise, though the security may avail pro tanto, it cannot be held to work any change of the property. The supplying of funds may be a matter of arrangement as to the convenience of the parties, but it can found no title to property, unless it was done with a full transfer of the account and risk at the same time. The consignor consigns the goods to a house in London, and if they had been lost, the loss would have fallen upon him. The claimant could exercise no dominion over them, he could not direct the consignment to be made to the house in London. That the transaction was so conducted was mere matter of convenience and accommodation, but can make no difference as to the principle, on which the question of property is to be considered. No title of property is conveyed to the claimant, but a mere interest in the goods as the transaction stood. Suppose that the consignor had thought proper to pay for the vessel in any other manner, it was clearly in his power to make such provision, and it could not then have been maintained that the claimant retained any interest, much less any title of property in the goods (*b*). Where a shipment was made by a British house on neutral accounts, and it appeared, that before the rupture between France and America, they were used to specify the account and risk of the claimant ; but that after that time, when it became unsafe, that American interests should be held forth ostensibly, they introduced the general terms “ neutral account ” only, and that since that alteration, several ship-

(*b*) *The Maryanna*, 6 Rob. 24.

ments made for neutral account had been carried to the account of the claimant, by the shipper as his agents; but it did not appear, that they had not since that time made shipments in the same manner, which had not been carried to his account; and no orders were exhibited from America nor any advice to America; and it did not appear, that the goods were entered as the property of the claimant, or that there was anything in the books of the shippers to appropriate the goods to the agency account and restrain them from taking the shipments to their own account; it was held, that the property was not shewn to be divested out of the shippers. *Primâ facie*, a merchant is to be taken as acting for himself; if a person is not a merchant, that may give a qualified character to his acts; but if a merchant appears to be carrying on a considerable trade, his acts are *primâ facie* to be considered, as on his own account. It is scarcely possible, that such a state of things should exist, as that business should go on without making any appropriation, till the matter is over; and that when the rights of some third person have intervened, the agent should then have the liberty of declaring in what capacity he acted. Between the parties themselves it cannot be, that the agent should have the liberty of doing this, by which he might take all lucrative transactions to himself, and appropriate all losing adventures to his principal. If this would be an absurd state of things between the parties themselves, it becomes more unreasonable, that such a liberty should be allowed, when the rights of other persons interpose (c). In general the rules of the Prize Court, as to the vesting of property, are the same as those of the common law, by which the thing, sold after the completion of the contract, is properly at the risk of the purchaser. But the question still recurs, when is the contract executed? It is certainly competent to an agent abroad, who purchases in pursuance of orders to vest the property imme-

diately on the purchase in his principal. This is the case, where he purchases on the credit of his principal, or makes an absolute appropriation or designation of the property for his principal. But where a merchant abroad in pursuance of orders, sells either his own goods, or purchases goods on his own credit, and thereby in reality becomes the owner; no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time, he has in legal contemplation, the exclusive property as well as possession, and it is not a wrongful act in him to convert them to any use which he pleases. He is at liberty to contract upon any new engagements, or to substitute any new engagements with respect to the shipment. Where goods were shipped by a house of trade in the enemy's country to a house consisting of the same partners in a neutral country, and the invoices expressed the shipment to be made by order and for account of the claimant, and contained charges of freight, commission, and insurance, and an acknowledgment of giving credit for three or six months; but a letter from the shippers to the consignees stated, that the amount of the order would exceed the amount of the claimant's shipments and the whole was therefore consigned to their correspondents that they might come to a proper understanding; the Court held, that the delivery to the master was not for the use of the claimant, but for the consignees, who were in fact the shippers. They retained the constructive possession, as well as the right of property, and it was apparent from the letter, that the shippers meant to reserve to themselves and to their agents in relation to the shipment all those powers, which ownership gives over property. All the papers respecting the shipment were addressed to their own house, and the claimant could have no knowledge or controul of the shipment, unless by consent of the consignees, under future arrangements to be

dictated by them ; the goods were therefore during the transit, the property of the shippers and at their risk (*d*). Where goods had been ordered by the claimants, and the invoice and bill of lading were directed to them under cover to the agent of the consignor, who was instructed to make inquiries and to deliver them or not according to the result, and if war continued, the goods were not to be delivered till paid for ; it was held, that the property of the consignor was not divested. In this case, the consignor reserved the power of an owner and instructed his agent, how that power was to be exercised. There being no letter addressed to the claimants, they were to know nothing of the shipment, unless in the opinion of the agent it should be prudent to make the communication, and even then the property was not to become theirs under the original contract, but under a new contract to be made with the agent (*e*). .

To vest goods in a consignee there must be either an order, or an acceptance, or a legal obligation to accept them. Where no specific order was given for goods, but the shippers knew the quality of the goods wanted by the consignees, and there was an understanding that they were to make their shipments without waiting for orders ; it was held, that the shipment was not vested in the consignees without acceptance. A general order to ship goods of a certain quality will not impose upon the consignees a legal obligation to accept goods of that description to any amount. There might exist an expectation on the part of the shippers that they would be accepted and paid for ; but there was no legal obligation on the consignees to accept them, and, therefore, the property was not divested until some act done by them in the nature of an acceptance (*f*). The property of an enemy going to a neutral to be his at his election on its arrival, remains during the whole

(*d*) *San Jose Indiano*, 2 Gallison, U. S. 294.

(*e*) *The Merrimack*, 8 Cranch, 328.

(*f*) *The Cousine Maryanne*, Edw. 346.

voyage the property of the enemy. It is not competent to the consignee to change by his election during the voyage the character, which attached to the property at its shipment. During the whole voyage it must be subject to the right of the shipper, and this right by capture becomes vested in the captor. Where the interests of third parties intervene, the right of election cannot defeat their rights. The great principles of international law require, that no secret liens, no future elections, no private contracts looking to future events, should protect the property of the enemy during its transit (*g*). Where goods were sent in consequence of an agreement between the consignor and consignee, that the former should ship goods in England to the latter in America, on their joint account, as soon as the intercourse between the two countries was open, and the account was so expressed in the invoice; but the invoice was enclosed in a letter which contained these words, "they are to be sold on joint account, or on mine at your option:" they were held to be the property of the consignor. To effect a change of property between seller and buyer, it is essential that there should be a contract of sale agreed to by both parties; and if the thing agreed to be sold is to be sent from the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or his agent, which the master for many purposes is considered to be. The delivery to the master was not a delivery on the joint account any more than it was a delivery on the sole account of the consignor, and consequently, it amounted to nothing for the purpose of divesting the property, until the consignee should elect to take them on joint account. Until this election was made the goods were at the risk of the consignor, and this is conclusive as to the right of property (*h*). So where the consignor shipped goods

(*g*) *The Frances*, 1 Gallison, U. S. 445; S. C. (on appeal), 8 Cranch, 335. 418.

(*h*) *The Venus*, 8 Cranch, 275.

in pursuance of an order, but sent other goods with them, and expressly stipulated that the consignee should take all or none (*i*). So where the consignor shipped goods to the consignees to be disposed of by them on their own account as purchasers, but without any order (*k*).

Fifthly. As to the national character of the produce of landed estates. Landed estate alone has never been held sufficient to constitute domicile, or to fix the national character of the possessor, who is not personally resident upon it, except with regard to property that is going as the immediate produce of that landed estate (*l*). The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be condemned as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation (*m*). That the possession of the soil does impress upon the owner the character of the soil, as far as the produce of that plantation is concerned in its transportation to any other country, whatever be the local residence of the owner, has been so repeatedly decided, that it is no longer open to discussion. No question can be made upon the point of law at this day (*n*). Thus, where a Dane acquired land in Santa Cruz, and held it after the island had been captured by the British forces; it was held, that the produce of his estate, shipped after the capture, was British property. The identification of the national character of the owner, with that of the soil in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general

(*i*) *The Frances*, 8 Cranch, 357.

(*k*) *The Frances*, 8 Cranch, 359.

(*l*) *Per Cur.* *The Dree Gebroeders*, 4 Rob. 232.

(*m*) *Per Cur.* *The Vrouw Anna Catharina*, 5 Rob. 161.

(*n*) *The Phoenix*, 5 Rob. 20.



character. The acquisition of land in Santa Cruz bound him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the character of the proprietor. When that island became British, the soil and the produce, while that produce remained unsold, were British. The general, commercial, or political character of the claimant could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respects his plantation in Santa Cruz, with the permanent interest of Santa Cruz, which was at that time British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy; he could ship his produce to Great Britain in perfect safety. Land is fixed. Wherever the owner may reside, that land is hostile or friendly, according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinion, to say that the proprietor, so far as respects his interest in the land, partakes of its character, and that the produce is subject to the same disabilities (*o*).

Sixthly. As to the national character of countries. Where a country is ceded by treaty, it retains its national character until possession is taken by the power to whom it is ceded (*p*). Where possession is taken of a country in time of peace with the concurrence of its sovereign, that fact proves a voluntary surrender in consequence of a previous cession (*q*). Where countries are conquered and taken possession of during war, although such acquisitions are not considered permanent until confirmed by treaty, yet for every commercial and belligerent

(*o*) *Bentyon v. Boyle*, 9 Cranch, 191.

(*p*) *The Fama*, 5 Rob. 106.

(*q*) *The Bolletta*, Edw. 171.

purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them (*r*). Where part of a country has been wrested by insurgents from the dominion of its sovereign, it cannot be treated by a Court of Prize as no longer forming part of his dominions, though he be an enemy, until the fact has been in some manner recognised by the government to which the Court belongs. Thus, where several parts of the island of St. Domingo were in the actual possession of insurgent negroes, who had detached them as far as actual occupancy could do from the mother country of France and its authority, and maintained therein an independent government of their own: it was contended, that although this new power had not been directly or formally recognised by any express treaty, yet the British government had shewn a favourable disposition towards it, on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion; and that St. Domingo could not, therefore, be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation and with much expressed reluctance, that nothing had been declared or done by the British government that could authorize a British tribunal to consider this island generally, or parts of it, as being other than still a colony, or parts of a colony, of the enemy. Although it was matter of notoriety, that a considerable part of St. Domingo had been emancipated from the dominion of the enemy, there was no sufficient ground to authorize the Court to presume a change in its national character. It always belongs to the government of the country to determine in what relation any other country stands towards it; this is a point upon which Courts of justice cannot decide. But where orders in council had issued permitting British vessels to go to such ports and places in the island of St.

(*r*) *Bentzon v. Boyle*, 9 Cranch, 191.

Domingo as shall not be under the dominion and in the actual possession of the enemy; it was held, that those orders contained a recognition on the part of the government, that there were ports and places in St. Domingo not only not in the possession, but not under the dominion of France; that the Court could then look no further than to see whether the port in question comes within that description (*s*).

(*s*) *The Manilla*, Edw. 1; *The Pelican*, Edw. App. (D).

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## CHAPTER III.

## OF THE RIGHT OF CAPTURE.

THE right of capture may be considered in respect of: First, The right of search. Secondly, The right of detaining vessels and bringing them in for adjudication. Thirdly, The right of freight. Fourthly, The right of neutrals to costs and damages in case of detention without probable cause, and to compensation for any illegal violence, or other wrongful act, on the part of captors.

First, Of the right of search. Grotius has fallen into an important error respecting the correspondence of Queen Elizabeth and Henry 4 on this subject. He states, that after the peace of Vervins, while the war continued between England and Spain, the English sought permission to visit and search French vessels for the purpose of preventing the importation of contraband into Spain, which was refused, on the ground that they were seeking a pretext for the pillage of vessels and the obstruction of commerce (*a*). From the diplomatic history of the period, it appears, that a temporary exemption of French vessels from visitation and search was conceded by special favour of Queen Elizabeth to Henry 4, on condition, that they should not supply corn to the Spanish forces. But the mischief, that arose from that concession in consequence of the supply of corn in breach of the condition, and of the assumption of the French flag by Spanish vessels, soon led to its revocation, and a subsequent proposal to em-

(*a*) Grot. iii. 1, v. (*n*).

body it in the articles of the treaty of 1602 was peremptorily rejected (*b*).

Every vessel is bound to submit to visitation and search, whether it be the vessel of a friend or of an ally, or even of a subject; and submission may be compelled, if necessary, by force of arms without giving claim to compensation for any damages incurred thereby; if the vessel upon visitation should not be found liable to be detained. No circumstances can dispense with this obligation. A vessel is not exempted either by its built, or by its flag; such circumstances furnish no proof of the national character of the vessel; and if a vessel be neutral, a belligerent is entitled to ascertain, whether there is either enemy's property or contraband of war on board. If the master of a vessel resists search by force, that is a ground of confiscation (*c*). The French Ordinances of 1584 and 1681, expressly provide that every vessel shall be good prize in case of resistance and combat. The same penalty is provided by the Spanish Ordinance of 1718, in case of resistance or combat; and Valin is of opinion, that the word "and" in the French Ordinance is to be read "or" (*d*).

The right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. Till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it, who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry, whether there is property that can be legally captured, it is impossible to capture. Even those who

(*b*) Winwood's Mem. i. 19, 22; Rob. Coll. Mar. 49.

(*c*) Val. Comm. iii. 9, xii.; Tr. des Pr. iv. 1; The *Topaz*, 2 Acton, 20.

(*d*) D'Abreu, vii. § 4, p. 91; Val. Tr. v. 8, § 6.

contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right, at least, for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant with subjects of this kind has ever breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force; something in the nature of civil process, where force is employed; but a lawful force, which cannot lawfully be resisted. For it is a wild conceit, that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case, in which it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist. The authority of the sovereign of the neutral being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. What may be given, or be fit to be given, in the administration of this species of law to considerations of comity or of national policy, are views of the matter, which a Prize Court has no right to entertain. Legally, it cannot be maintained; that, if a belligerent commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, a neutral sovereign is authorized by that law to obstruct the exercise of that right with respect to the merchant

ships of his country. Two sovereigns may agree, if they think fit, as in some late instances they have agreed, by special covenant; that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply, that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and, if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge, which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search to be exercised by those who have an interest in making it. Among the loose doctrines, which modern fancy under the various denominations of philosophy and philanthropy have thrown upon the world, it has been advanced or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations, it is not necessary to descant. The law and practice of nations give them no sort of countenance, and until that law and practice are new modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, no reverence is due to them; they are the elements of that system, which, if it is consistent, has for its real purpose an entire abolition of capture in war; that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit, that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way, which professing gravely to adhere to that system, which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles,

delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states and of the lives and safety of innocent individuals.

The penalty for a violent contravention of this right, is the confiscation of the property so withheld from visitation and search. Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law, expresses himself thus: "On ne peut empêcher le transport des effets de contrabande, si l'on ne visite pas les vaisseaux neutres, que l'on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se ferait condamner par cela seul comme étant de bonne prise." Vattel is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting the fact, that such is the existing practice of modern Europe. And to be sure, the only marvel in the case is, that he should mention it as a law merely modern (*e*), when it is remembered, that it is a principle not merely of the civil law, on which great part of the law of nations is founded, but of the private jurisprudence of most countries in Europe, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle, we find in the celebrated French Ordinance of 1681, now in force, Article XII, that every vessel shall be good prize in case of resistance and combat; and Valin, in his smaller Commentary, says expressly, that although the expression is in the conjunctive, yet that resistance alone is sufficient. He refers to the Spanish Ordinance of 1718, evidently copied from it, in which it is expressed in the disjunctive, in case of resistance or combat; and recent instances prove that Spain continues to act upon this principle. The first time

(*e*) Vattel was misled by Grotius's account of the correspondence between Henry 4 and Queen Elizabeth. *Vide* Vatt. iii. § 114.



that it occurs in the institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty, is in the Order of Council, 1664, Article XII., which directs, that when any ship met withal by the royal navy, or any ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize. A similar article occurs in the proclamation of 1672. In these orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon. But this article is not one of those which he reprehends; and it is observable, that Sir Robert Wiseman, then King's Advocate General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. Hence it appears, that it was the rule and the undisputed rule of the British Admiralty. Cases may occur, in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause: a merchant vessel has not a right to say for itself, and an armed vessel has not a right to say for it, I will submit to no such inquiry, but I will take the law into my own hands by force. If each neutral vessel has a right to judge for itself in the first instance, whether it is rightly detained, and to act upon that judgment to the extent of using force, nothing but battle and bloodshed can be the issue, as often as there is anything like an equality of force and an equality of spirit. The rule is, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals, whose noblest office is to relieve by compensation inconve-

niences of this kind, where they have happened through accident or error; and to redress, by compensation and punishment, injuries that have been committed by design.

Hence, where a number of merchantmen were sailing under convoy of a Swedish frigate, and the commander was ordered to treat all foreign ships of war with all possible civility, but if they would make any search amongst the merchant vessels under his convoy, which ought to be prevented as much as possible, and such a thing should be insisted upon, and notwithstanding his amicable comportment the merchant vessels should, nevertheless, be violently attacked, then violence must be opposed against violence; and the instructions to the merchantmen declared, that all merchant ships during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats should shew an intention of coming alongside the merchant ships are to sheer from them; and these instructions were acted upon by the frigate and merchant ships: it was held, that the ships and cargoes were subject to condemnation, though the commander of the frigate was prevented by an irresistible force from acting upon his instructions to their utmost extent (*f*). The resistance of the convoying ship is the resistance of the whole convoy (*g*). So, where the commander of the convoying ship sailing with similar instructions, being met by a superior force, threatened to fire upon the boats of the belligerent vessels to prevent visitation and search of the vessels under his convoy, but did not commit any actual violence, and at length consented to bring his convoy into the Downs (*h*). If the intention to resist was voluntarily and clearly abandoned, an intention so abandoned or even a slight hesitation about it would not constitute a violation of right.

(*f*) The Maria, 1 Rob. 340.

(*g*) The Elsabe, 4 Rob. 408.

(*h*) Ibid.

But where a ship of war sails under instructions to resist, the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey, and have no authority to vary them. The intention is necessarily unchangeable; and being so, it seems, that the delivery and acceptance of such instructions, and the sailing under them, are sufficient to complete the act of hostility (i). It is not an absolute impossibility that a commander should take upon himself the frightful responsibility of departing from the orders of his government, but it is most highly improbable, and every presumption is against it. A person acting under such instructions, must necessarily suppose, that all considerations of policy had been fully weighed by the state, and that all that is required of him is prompt obedience to the orders he has received (k).

Upon the same principle, a neutral ship and cargo sailing under hostile convoy are liable to be condemned. In this case an additional ground of condemnation is furnished by adherence to the enemy. A neutral vessel sailing with French cruisers, and communicating with them by signal when they engaged some English ships, was condemned by a Vice Admiralty Court, and the sentence was affirmed by the lords of appeal (l).

In the case of some American ships captured by the Danes under British convoy, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign after an earnest appeal made by the government of the United States. On that occasion the Danish minister pressed the argument, "that he, who causes himself to be protected by an enemy's convoy, ranges himself on the side of his protector, and thus puts himself in opposition to the enemy of his protector, and

(i) *Per Cur.* *The Maria*, 1 Rob. 374.

(k) *Per Cur.* *The Elsahe*, 4 Rob. 413.

(l) *Per Story, J.*, *arguendo*, *The Nereide*, 9 Cranch, 440, *et seq.*

evidently renounces the character of a friend to him, against whom he seeks protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of English ships of war without any risk; and he further declared, that none of the powers in Europe had called in question the justice of this principle." The American government acquiesced in the truth and correctness of this statement (*m*).

Upon the same principle it has been held, that goods put on board an armed merchantman having a commission of war, by a neutral with knowledge of the facts, are liable to condemnation. A ship furnished with a letter of marque is manifestly a ship of war, and is not otherwise to be considered, though she acts also in a commercial capacity. The mercantile character being superadded does not predominate over or take away the other. There was formerly indeed a distinction made between privateers and merchant vessels furnished with a letter of marque, the one being entitled to head money and the other not; but that distinction has been since entirely done away. A neutral subject is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the right of the enemy, who may capture the vessel, but who has no right, according to the modern practice of civilized states, to condemn the neutral property. Neither will the goods of a neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event, which the merchant could not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he

(*m*) *Per* Story, J., *arguendo*, *The Nereide*, 9 Cranch, 443.

would not do by putting them on board a mere merchant vessel; and so far as he does this he adheres to the belligerent, he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and it is clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is *pro hac vice* to be considered as an enemy. It is not a sufficient excuse to say, that their countrymen are not possessed of ships of their own sufficient for the whole of their commerce, and are, therefore, under the necessity of making use of those belonging to others. If they choose to take the protection of a hostile force instead of their own neutral character, they must take the inconvenience with the convenience, they must abide by the consequence resulting from that course of conduct, which, upon the whole knowledge of the matter they have thought proper to pursue (n).

Conversely it has been held, that neutral goods put on board an uncommissioned armed merchant vessel belonging to a belligerent, and resisting capture, are not subject to condemnation; if the armament be entirely and exclusively the act of the belligerent owner, and the resistance in no degree imputable to the neutral. A neutral has an undoubted right to put his goods on board a merchant vessel belonging to a belligerent; and this right would be frittered away, if it were confined to unarmed merchant vessels. Merchant vessels during war are generally more or less armed, and it is impossible for a Prize Court to distinguish between different degrees of armament (o). This judgment was disapproved of by Mr. Justice Story, and another Judge of the Supreme Court; first upon the ground, which it would be difficult to maintain, that no distinction is to be made between a commissioned and an uncommissioned armed merchant vessel; but principally upon the ground, which was passed over without notice by Chief Justice Marshall in delivering the judgment of the

(n) *The Fanny*, 1 Dod. 448.

(o) *The Nereide*, 9 Cranch, 387.

Court, that the claimant being the charterer of the whole vessel had bound her to sail under hostile convoy; and that the vessel was captured with the claimant on board, while accidentally separated from the convoy, and endeavouring to rejoin it. Mr. Justice Johnson, who gives a supplementary judgment in support of the opinion of the Court as delivered by Chief Justice Marshall, attempts to justify the act of the claimant in taking belligerent convoy upon the ground, that though neutral to America, he was in hostility to Carthage. Mr. Justice Story replies, that "it is not in relation to enemies that the question of taking convoy can ever arise. It has reference only to the rights of friendly belligerents, and these rights remain precisely the same, whatever may be the peculiar situation of the neutral as to third parties. It was never heard of, that a neutral might lawfully resist the right of search of one power, because he was at war with another, and the resistance to this right is just as injurious, whether he be at peace with all the world, or with part only. There would be an extreme difficulty of establishing, by any disinterested testimony, the fact of any such special intention as the argument supposes. Independent of this difficulty, it would in effect be an attempt to repel by positive testimony a conclusive inference of law arising from the act of taking convoy. The belligerent convoy is bound to resist all visitation by enemy's ships, whether neutral to the convoyed ships or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shews an intention to avail himself of its protection, under all the chances and hazards of war. The abandonment of such an intention cannot be otherwise evidenced, than by the overt act of quitting convoy. And it is impossible to conceive, that the secret wishes or private deliberations of a party could prevail over his own deliberate act of continuing under convoy, unless Courts of Prize would surrender themselves to the most stale artifices and imbecile excuses. It would

be in vain to administer justice in such Courts, if mere statements of intentions could outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great, whatever might be the special objects of the neutral. The right of search is effectually prevented by the presence of superior force, or only exercised after the perils and injuries of victorious warfare. And it is this very evasion of the right of search which constitutes the ground of confiscation in ordinary cases. The neutral in effect declares that he will not submit to search, until the enemy's convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral then could not, if proved, prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in the *Maria* and the *Elsabe*, and instantly repelled by the Court. On the whole on this point my judgment is, that the act of sailing under belligerent or neutral convoy is in itself a violation of neutrality, and ship and cargo, if caught in delicto, are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, the resistance of the convoy is to all purposes the resistance of the associated fleet" (*p*).

It may be added, that the judgment of the Court proceeds upon the ground, that the neutral is entitled to restitution only, when he is no party to the resistance, and, although the resistance of a master might not affect a claimant, when he is not privy to it; it is not easy to see how privity and participation can be more effectually established, than by the claimant having bound the vessel to sail under belligerent convoy, and being on board while she was so sailing in pursuance of the covenant, which he had imposed. Although the point considered by the Court in the case of the *Nereide*, seems to be correctly decided; some parts of the argument

(*p*) *Ibid.* 444

will not bear examination. Amongst other things it is said, "if the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same course? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the Court to afford a strong argument in favour of the goods. The law would operate in the same manner on both (q). The same argument would apply equally to goods forfeited for breach of blockade, or resistance to search by a neutral master. All property is condemned as the property of enemies, or of those, who have rendered themselves liable to be treated as enemies on the particular occasion; but the highest penalty that Prize Courts can inflict, does not go beyond confiscation of property.

But actual resistance will not incur the penalty of confiscation, when the master is not aware of the existence of war, and consequently not aware that he has any neutral duties imposed upon him. Thus, where a master sailed in ignorance of war, and resisted search on the supposition that the cruiser was a pirate, and afterwards attempted to escape, on the supposition that his own character was not that of a neutral, but of an enemy: it was held, that the mere attempt to escape before possession taken was not sufficient to draw with it the consequence of condemnation; that to support the imputation of a violation of neutrality, he must have had reason to suppose himself a neutral and not an enemy, and, that, consequently, the acts of resistance, which had not gone the length of hostile violence, were acts of innocent misapprehension only (r). The right of search has been varied by several treaties.

By the fourth article of the Maritime treaty, concluded at St. Petersburg between Great Britain and Russia in June,

(q) 9 Cranch, 429.

(r) The St. Juan Baptista, 5 Rob. 33.



1801, and acceded to by Denmark and Sweden respectively as principals in 1802 (*s*), for the purpose of arriving at a settled determination of their principles respecting the rights of neutrality, it is declared; that the high contracting parties, being desirous of preventing all ground of dissension for the future, by restricting the right of visiting merchant vessels sailing under convoy, to the only cases in which a belligerent power can suffer any real prejudice by the abuse of the neutral flag, have agreed, that the right of visiting merchant vessels belonging to the subjects of one of the contracting powers, and sailing under convoy of a ship of war of such power, shall not be exercised by any but ships of war of the belligerent party, and shall not extend to vessels furnished with letters of marque, privateers or other vessels, which do not belong to the imperial or royal fleets of their Majesties, but which their subjects have sent forth for war."

That the owners of all merchant vessels belonging to subjects of one of the contracting sovereigns, which shall be destined to sail under convoy of a ship of war, shall be bound, before they receive their instructions for sailing, to produce to the commander of the convoying ship their passports and certificates or sea letter in the form annexed to the present treaty.

That when any ship of war, having under its convoy any merchant vessels, shall be met by any ship or ships of war of the other contracting party, who shall then be in a state of war, to avoid all disorder they shall keep out of range of gunshot, unless the state of the sea or the place of meeting shall make a nearer approach necessary; and the commander of the ship of the belligerent power, shall send a boat on board the convoying ship, where proceedings shall be had for the mutual verification of papers and certificates, which ought to shew on the one part, that the neutral ship of war is authorized to take

(*s*) Mart. Trait. Supp. ii. 476.—iii. 192. 196.

under its convoy, such and such merchant vessels of its nation, laden with such a cargo and for such a port: on the other part, that the ship of war of the belligerent party belongs to the royal or imperial navy of their Majesties.

Which verification having been made, no visitation shall take place, if the papers are found to be regular, and there exists no valid ground of suspicion. In the opposite case the commander of the neutral ship of war (being thereunto duly required by the commander of the ship or ships of the belligerent power), must bring to and detain his convoy during the time that shall be necessary for the visitation of the vessels, which compose it: and he shall have the right of naming and delegating one or more officers, who shall assist in the visitation of the said vessels, which shall be made in his or their presence on board each merchant vessel conjointly with one or more officers appointed by the commander of the ship of the belligerent party.

If it should happen that the commander of the ship or ships of the power at war having examined the papers found on board, and interrogated the master and crew of the vessel, shall see just and sufficient reasons for detaining the merchant vessel for the purpose of further search, he shall notify that intention to the commander of the convoying ship, who shall be empowered to appoint one officer to remain on board the vessel thus detained, and to assist in the examination of the cause of its detention. The merchant vessel shall be immediately carried into the nearest and most convenient port of the belligerent power, and the further inquiry shall be conducted with all possible diligence.

It is also agreed, that if any merchant vessel so convoyed, has been detained without just and sufficient cause, the commander of the vessel or vessels of the belligerent power shall not only be bound to make full and perfect satisfaction to the owners of the ship and cargo for all losses, damages, and expenses occasioned by such detention: but shall suffer such

further punishment for every act of violence or other wrongs by him committed, as the nature of the case shall require. On the other hand, the convoying ship shall not be allowed on any pretext whatsoever, to oppose by force the detention of any merchant vessel or vessels, by the ship or ships of war of the belligerent power; but the commander of the convoying ship is to be subject to no such prohibition with regard to privateers and vessels furnished with letters of marque.

By the treaty between Great Britain and Sweden, 21st October, 1661 (*t*), it is provided, Article XII., that for the evading of all suspicion and collusion, lest the free navigation or intercourse of one of the confederates or his subjects by land or by sea, with other nations, while the other confederate is at war, should be carried on to the prejudice of the other confederate, and lest the enemies' goods and merchandize should be concealed under the disguise of the goods of friends, it is stipulated, that all ships, carriages, wares, and men belonging to the other of the confederation, shall be furnished in their journies and voyages with safe conducts, commonly called passports and certificates, such as are underwritten verbatim, signed and subscribed by the chief magistrate of that province or city, or by the chief commissioners of the customs and tolls, and specifying the true names of the ships, carriages, goods, and masters of the vessels, as also the exact dates, together with other descriptions of that sort, as are expressed in the following form of a safe conduct or certificate (*u*). Therefore when the merchandize, goods, ships, or men of either of the confederates and his subjects and inhabitants shall meet, or be met in the open sea, straits, harbours, havens, countries, or other places whatsoever, by men of war or privateers, or by the subjects and inhabitants of the other confederate, after producing only their safe conducts and certificates aforesaid, nothing further shall be demanded of them, no inquiry what-

(*t*) Chalmers, Tr. i. 53; Jenkinson, Tr. i. 166.

(*u*) See Appendix (A.)

soever shall be made into the goods, ships or men, much less shall they be injured, damaged, or molested, but shall be freely let go to prosecute their voyage and purpose. But if this solemn and stated form of the certificate be not produced, or there be any other just and urgent cause of suspicion, then this ship ought to be searched, which shall only be deemed justifiable in this case and not otherwise.

It has been held, that the circumstance of a number of vessels bound to various ports of the Mediterranean, laden with iron, hemp, pitch and tar, intending to sail along the coasts of the several public enemies of this kingdom, under the protection of an armed frigate, associated with them for the very purpose of beating off by force, all particular inquiry was sufficient to excite the just and grave suspicion which the treaty refers to. The treaty supposes an inquiry for certain papers, and if they are not exhibited, or there is any other just and strong cause of suspicion, then the ship is to undergo search. The treaty, therefore, recognises the rights of inquiry and search; and the violation of those rights, is no less a violation of the treaty than it is of the general law of nations (*v*).

By the treaty between Great Britain and Denmark, 12th July, 1670 (*w*), Article XX., it is agreed, that lest such freedom of navigation or passage of the one ally and his subjects and people during the war, that the other may have by sea or land with any other country, may be to the prejudice of the other ally, and that goods or merchandize belonging to the enemy may be fraudulently concealed under colour of being in amity: for the preventing of fraud and clearing all suspicion, it is thought fit, that the ships, goods, and men belonging to other confederates in their passage and voyages, be accompanied with letters of passport and certificate, the forms thereof to be as follows (*x*). The form of the safe conduct certifies, that the ship and goods

(*v*) The Maria, 1 Rob. 371.

(*w*) Chalmers, Tr. i. 86.

(*x*) Appendix (A.)

do solely, truly and really belong to subjects of the confederate and other neutrals, and not to either of the parties in hostility; the treaty then proceeds to provide for the right of search, in case of the safe conduct not being exhibited, or there being any other just and urgent cause of suspicion, in the same words as the treaty with Sweden, from which it is apparently copied.

By the treaty of Utrecht between England and France, 11th April, 1713 (*x*), it is agreed, Article XXL, that to the end all manner of dissensions and quarrels may be avoided on one side and the other, in case either of their royal majesties, who are allied, should be engaged in war, the ships and vessels belonging to the subjects of the other ally must be furnished with sea letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the commander or master of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the princes; which passports shall be made out and granted according to the form annexed to this treaty (*y*); they shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed, that such ships being laden are to be provided, not only with passports, but with certificates containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, so that it may be known whether any forbidden or contraband goods, as are enumerated in the nineteenth article of this treaty, be on board the same, which certificates shall be made out by the officers of the place, whence the ship set sail, in the accustomed form. Article XXIV. But in case the ships of the subjects and inhabitants of both their serene Majesties, either on the coast or on the high seas, shall meet with the men of war of the other or with privateers, the said men of

(*x*) Chalmers, i. 390.

(*y*) Appendix (A.)

war and privateers, for preventing any inconveniences, are to remain out of cannonshot, and to send a boat to the merchant ship which has been met with, and shall enter her with two or three men only, to whom the master or commander of such ship or vessel shall shew his passport concerning the property thereof, made out according to the form annexed to the present treaty (*y*); and the ship, which shall exhibit one, shall have free passage, and it shall be wholly unlawful any way to molest her, search or compel her to quit her intended course. Article XXV. But that merchant ship of the other party, which intends to go to a port at enmity with the other confederate, or concerning whose voyage and the sort of goods on board there may be past suspicion, shall be obliged to exhibit, either on the high seas or in the ports and havens, not only her passports, but her certificates, expressing that they are not of the kinds of goods prohibited, which are specified in the nineteenth article. Article XXVI. But if one party, in the exhibiting the above said certificates mentioning the particulars of the things on board, should discover any goods of the kind, which are declared contraband, or prohibited by the nineteenth article of this treaty, designed for a port subject to the enemy of the other, it shall be unlawful to break up the hatches, &c., unless in the presence of the officers of the Court of Admiralty, &c. Hence it appears, that by this treaty the right of visitation continues for the purpose of examining the papers required to be exhibited; and, where contraband articles appear on the face of the papers, the right of capture, and bringing in for adjudication, because otherwise the vessel could not be brought under the supervision of the officers of the Court of Admiralty.

The Articles VIII, IX. and XIV. of the treaty between England and the States General, 17th February, 1668 (*z*), are

(*y*) Appendix (A.)

(*z*) Chalmers, i. 162.

to the same effect; but the fourteenth article further provides, that if the master of the ship should be content to deliver the said contraband goods to the said captain, and to pursue his voyage, in that case the master shall by no means be hindered from continuing his course and the design of his voyage. The same provisions are repeated in the treaty between England and the States General, 1st December, 1674 (*z*), Articles V., VI. and VII.

By the treaty between England and Morocco, 1761 (*a*), Articles III. and IV., it is agreed, that all ships belonging to the subjects of the said King of Great Britain and of the Emperor of Fez and Morocco and his subjects, may securely navigate and pass the seas without being searched or receiving hindrance or trouble the one from the other; and that all persons and passengers, of whatever nation they may be, belonging to either of the parties, shall be entirely free without being detained, molested, robbed, or receiving any damage from the others. It is besides agreed, for the better observance of the preceding articles according to their true intent, that the ships of war or cruisers belonging to the Emperor of Fez and Morocco, or to his subjects, meeting with any ships or other vessels of the King of Great Britain or his subjects (not being in the seas belonging to his Majesty's dominions) may send a single boat on board with two trusty rowers and no more, who may enter such ships or vessels; that on shewing them a passport signed by the King of Great Britain, or by the High Admiral of England, Scotland and Ireland, in the form hereafter mentioned (*b*), the said boat shall depart immediately, leaving such ships to pursue their voyage freely; and when it may happen that any ship of war or privateer of the King of Great Britain shall meet any ship or vessel of the Emperor of Fez and Morocco,

(*z*) Chalmers, i. 177.

(*a*) Chalmers, ii. 345.

(*b*) Appendix (A.)

or of his subjects, on the captain of such ship shewing a passport from the governor of the city to which he belongs, with a certificate from the English consul, or in case of his death or absence, from the major part of the English merchants residing there; in such case he shall be permitted to pursue his voyage without impediment or injury. This treaty does not apply to vessels trading between the ports of the enemy. Its purpose is to protect the ordinary commerce of each nation. It is not to be hastily admitted, that a very modern treaty would be made with so improvident a meaning, that it might be applied to protect the whole trade of the enemy from the rights of British cruisers. In the Dutch treaty there is a special stipulation allowing vessels to pass unsearched expressly between the ports of the enemy; and the express allowance of such a commerce, so specifically described in that treaty, is rather an argument against the claim of such an indulgence, founded only on the general and indefinite terms employed in this (b).

Secondly, Of capture. The right of capture attaches on the ships of the enemy and their cargoes, being enemy's property, on enemy's goods on board neutral ships, on neutral ships and cargoes engaged in unneutral transactions, such as trading in contraband, violation of blockade, or other acts of adherence to the enemy, and interposition in the war. The subjects of contraband, and breach of blockade, will be considered in the two following chapters.

Neutral goods on board enemy's ships are not confiscable; but all such goods are presumed to be enemy's property, until the contrary is proved (c). The French ordinance, as explained by Valin, provides, that neutral goods on board an

(b) *Per cur.* The Annemur, 3 Rob. 73.

(c) Consolato, c. 276, Capmany, p. 276, Coll. Mar. p. 4; Alberic, Gent. Ad. Hisp. i. xx.; Grot. iii. 6, vi. xxvi.; Loccen. de J. M. ii. 4, xi.; d'Abreu, p. 104; Bynk. Q. J. P. i. xiii; Heinecc. de Nav. ii. § viii. ix. xi.; Vatt. iii. § 75; Heinecc. Prælec. in Grot. iii. 6, vi.



enemy's ship shall be good prize (*d*). Valin resorts to a very whimsical argument in defence of this illegal ordinance, and suggests, that it could not be expected, that the goods of neutrals should be spared, when the goods of subjects are condemned under the same circumstances (*e*). But trading with the enemy is an offence in a subject, but no offence in a neutral; and a sovereign may make what laws he pleases to bind his own subjects, but neutrals are not bound by them. The French government appear to have felt the injustice of this regulation in 1650, for the sixth article of the declaration of that date is conformable to the common law; but the old rule was revived by the Ordinance of 1681 (*f*). Enemy's goods on board neutral vessels are liable to confiscation, but the penalty does not extend to the vessels in which they are conveyed (*g*). By the ordinances of France and Spain, neutral vessels having enemy's goods on board, were declared to be good prize, but this rule was peculiar to those states, and never formed part of the common law of nations (*h*).

It must be admitted, however, that there appears at one time to have been a general disposition amongst European states to hold, that vessels were confiscable for the carriage of enemy's goods. This opinion appears to have arisen from a false analogy derived from the civil law, whereby vessels were forfeited in some cases for the carriage of illicit goods. *Dominus navis, si illicite aliquid in nave vel ipse vel vectores imposuerint, navis quoque fisco vindicatur. Quod si, absente domino, id a magistro, vel gubernatore, vel proretâ, nautâve aliquo factum sit, ipsi quidem capite puniuntur, commissis mercibus; navis*

(*d*) Val. Comm. iii. 9, vii.

(*e*) Val. Comm. iii. 9, vii. p. 235.

(*f*) Val. *ibid*.

(*g*) Consolato, *ibid.*, Capm. p. 274, Coll. Mar. i. § 2; Grot. iii. i. v. 4 (*n*); Loccen. *ibid*. xii.; Bynk. Q. J. P. i. xiv; Heinecc. de Nav. ix.; Voet de re Militari, v. 21; Zouch de Jud. ii. 8, vi.; Vatt. iii. § 74.

(*h*) Val. Comm. iii. 9, vii. p. 234; d'Abreu. viii. § 6, p. 108; The Nereide, 9 Cranch. 426.

## OF THE RIGHT OF CAPTURE.

o restituitur (*h*). Accordingly Loccenius lays it ships are not liable to condemnation by reason of es, unless shipped with the knowledge of the Zouch refers to the same law (*k*). But it is this analogy is wholly inapplicable to neutral contraband. Accordingly D'Abreu, after referring the same analogy, correctly observes, that there is no why a neutral vessel should be condemned for having ay's goods on board, for that proves nothing more than mmerce with the enemy, which is perfectly legal in a tral. But in case of a subject, such commerce is made by the declaration of war, and in that case the con- mination of the vessel is a just punishment for his illegal duct (*l*).

The rules of the common law of nations respecting the ods of an enemy on board the ship of a friend; and the ods of a friend on board the ship of an enemy, are subject o many exceptions contained in particular treaties.

By the treaty between England and France, 23rd February, 1677 (*m*), Article VIII., it is agreed, that merchandizes ap- pertaining to the subjects of either party, found on board an enemy's ship shall be forfeited; but the merchandizes of an enemy found on board the ships of the subjects of either party, shall not be forfeited, unless they be contraband.

By the commercial treaty of Utrecht between England and France (*n*), it is agreed, that it shall be lawful for all and singular the subjects of the Queen of Great Britain, and of the most Christian King, to sail with their ships with all manner of liberty and security, no distinction being made,

(*h*) Ff. xxxix. 4, xi.

(*i*) Loccen. de J. M. ii. 4, xi.

(*k*) De Judicio inter Gentes, viii. 6.

(*l*) D'Abreu, ix. 14, p. 123; Alberic. Gent. Adv. Hisp. i. xxviii.; Heinecc. de Nav. ix.

(*m*) Jenkinson's Treaties, i. 210.

(*n*) Chalmers' Treaties, i. 390.

who are the proprietors of the merchandizes laden thereon, from any port to the places of those, who are now or shall be hereafter at enmity with the Queen of Great Britain, or the most Christian King; it shall likewise be lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandizes aforementioned, and to trade with the same liberty and security from the places, ports, and havens, of those, who are enemies of both or of either party, without any opposition or disturbance whatsoever; not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several. And it is now stipulated concerning ships and goods, that free ships shall also give a freedom to goods, and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof, should appertain to the enemies of either of their Majesties, contraband goods being always excepted; it is also agreed in like manner, that the same liberty shall be extended to persons who are on board a free ship with this effect, that although they be enemies to both or to either party, they are not to be taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

Article XXVII. On the contrary, it is agreed, that whatever shall be found to be laden by the subjects and inhabitants of either party, on any ship belonging to the enemy of the other and his subjects, the whole, although it be not of the sort of prohibited goods, may be confiscated in the same manner as if it belonged to the enemy himself, except such goods and merchandizes as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done within the time and limits following: that is to say, if they were put on board such ship in any port or place within the space of six weeks after such declaration, within the

bounds called the Naze, in Norway, and the soundings; of two months from the soundings to the city of Gibraltar; of ten weeks in the Mediterranean sea; and of eight months in any other country or place in the world: so that the goods of the subjects of either prince, whether they be of the nature of such as are prohibited or otherwise, which as is aforesaid, were put on board any ship belonging to an enemy before the war, or after the declaration of the same, within the time and limits abovesaid, shall noways be liable to confiscation, but shall well and truly be restored without delay, to the proprietors demanding the same; but so that if the said merchandizes shall be contraband, it shall not be anyways lawful to carry them afterwards to the ports belonging to the enemy.

By the treaty between England and the States General, 17th February, 1668 (*o*), Article X; it is agreed that whatsoever shall be found laden by his Majesty's subjects upon a ship of the enemies of the said states, although the same were not contraband goods, shall yet be confiscated with all that shall be found in the said ship, without exception or reservation; but on the other side also, all that shall be found in the ships belonging to the King of Great Britain's subjects, shall be free and discharged, although the lading, or part thereof, belong to the said states' enemies, except contraband goods. Article XI. All the subjects and inhabitants of the said united provinces shall reciprocally enjoy the same rights, privileges, and exemptions, it being to be understood, that the equality shall be mutual every way on both sides.

By the treaty of 1st December, 1674, between the same parties (*p*), Article VIII., it is agreed, that whatsoever shall be found laden by his Majesty's subjects, upon any ship whatsoever belonging to the enemies of the lords the states, although the same be not of the quality of contraband

(*o*) Chalmers, i. 162.

(*p*) Chalmers, i. 177.

goods, may be confiscated, but on the contrary, all that which shall be found in the ships belonging to the subjects of his Majesty shall be accounted clear and free, although the whole lading, or any part thereof, by just title of propriety, shall belong to the enemies of the lords the states, except always contraband goods, which, being intercepted, all things shall be done according to the meaning and direction of the precedent articles; and by the same reason, whatsoever shall be laden by the subjects of the lords the states in any ship whatsoever, belonging to the enemies of his Majesty, although the same be not of the quality of contraband goods, may be confiscated; but on the other side, all that shall be found in the ships belonging to the subjects of the lords the states, shall be accounted clear and free, although the whole laden, or any part thereof, by just title of propriety, shall belong to the enemies of his Majesty, except always contraband goods, which being intercepted, all things shall be done according to the meaning and direction of the precedent articles. And lest any damage should by surprise be done to the one party, who is in peace, when the other party shall happen to be engaged in war, it is provided and agreed, that a ship belonging to the enemies of the one party, and laden with goods of the subjects of the other party, shall not infect or render the said goods liable to confiscation, in case they were laden before the expiration of the terms and times hereafter mentioned, after the declaration or publication of any such war: viz., if the goods were laden in any port or place, between the places or limits called the soundings and the Naze in Norway, within the space of six weeks after such declaration; of two months, within the said place the soundings, and the city of Tangier; and of ten weeks in the Mediterranean sea; or within the space of eight months in any other country or place of the world. So that it shall not be lawful to confiscate the goods of the subjects of his Majesty, taken or seized in any ship or vessel whatsoever, of any enemy of the lords the

states upon that pretence, but the same shall be without delay restored to the proprietors, unless they were laden after the expiration of the said terms of time respectively ; but so that it may not be lawful for them afterwards to carry to the enemy's ports the said merchandize, which are called *contraband*, and for the reason aforesaid, shall not be liable to confiscation ; neither, on the other side, shall it be lawful to confiscate the goods of the subjects of the lords the states, &c. By the explanatory article of 1st December, 1674 (*q*), referring to the two last mentioned treaties, it is declared, that the true meaning and intent of the said articles is, and ought to be, that ships and vessels belonging to the subjects of either of the parties, can and might, from the time that the said articles were concluded, not only pass, traffic and trade from a neutral port or place, to a place in enmity with the other party, or from a place in enmity to a neutral place, but also from a port or place in enmity to a port or place in enmity with the other party, whether the said places belong to one and the same prince or state, or to several princes or states, with whom the other party is at war.

It has been held, that these articles do not extend to protect Dutch ships engaged in the enemy's colonial trade (*r*).

By the treaty between England and Portugal, 10th July, 1654 (*s*), Article XXII, it is agreed, that all goods and merchandize of the said republic, or king, or of their people or subjects, found on board the ships of the enemies of either shall be made prize, together with the ships, and confiscated to the public. But all the goods or merchandize of the enemies of either on board the ships of either, or their people or subjects, shall remain untouched.

The benefit of this treaty does not extend to a ship colourably transferred to a Portuguese subject (*t*), nor to a ship

(*q*) Chalmers, i. 189.

(*r*) *Per Cur.* The Santissima Coracao de Maria, 2 Acton, 100.

(*s*) Chalmers, ii. 280.

(*t*) The Flora, 6 Rob. 360.

sailing under a Portuguese flag and pass, but being the property of subjects of another state (*u*); nor does it extend to any illegal trade (*v*). When a Portuguese ship was taken on her return, having on her outward voyage carried a cargo of pitch and tar to an enemy's colony, and her returned cargo was the proceeds of that shipment, the Court said, "that it never was the intent of this treaty, to except the Portuguese from the general prohibition to trade with the colonies of the enemy. Portuguese subjects must now take the law relating to the colonies, to be the same with respect to them as to other nations. The order of June, 1803, regulating the trade of neutrals to enemy's colonies, contains specific exceptions, one of which is an express prohibition to carry contraband outwards; and it is of no consequence, what, in 1654, was the precise meaning of that term. The order of June, 1803, applies to all sorts of contraband then existing. It was their duty to ascertain, when there was such just reason for doubt and apprehension as to this undertaking, that the opinion which they were disposed to entertain of the treaty was well founded. It appears to us, that the claimants have taken up a question, upon which there can be no doubt" (*w*). There is also a distinction between the goods of either party put on board an enemy's ship before the contemplation of war, and an enemy's goods so shipped on board a vessel of either contracting party. In the latter case, the conduct of the parties would not have been different, if the event of war had been known; the cargo is entitled to the protection of the ship generally, even if shipped in open war, and a fortiori, if shipped under circumstances still more favourable to the neutrality of the transaction. In the other case, there is reason to suppose, that the treaty refers only to goods shipped on board an enemy's vessel in an avowed

(*u*) The *Cidade de Lisboa*, 6 Rob. 358.

(*v*) The *Asia*, Lords, 6 Rob., Index, Title *Free Ship*, note (*a*).

(*w*) The *Santissima Corocas de Maria*, Lords, 2 Acton, 91.

hostile character, and that the neutral merchant would have acted differently if he had been apprised of the character of the vessel, at the time when the goods were put on board (x).

Resistance to capture is a ground of condemnation. If neutral crews were allowed to resort to violence, to withdraw themselves out of the possession taken by a lawful cruiser, for the purpose of a legal inquiry, the whole business of the detention of neutral ships would become a scene of mutual hostility and contention; the crews of neutral ships must be guarded with all the severity and strictness practised upon actual prisoners of war, for the same measures of precaution and distrust would become equally necessary. The intercourse of nations, neutral and friendly towards each other, would be embittered by acts of hostility mutually committed by their subjects. At present, under the understanding of the law that now prevails, it is the duty of the cruiser to treat the crew of an apparently neutral ship, which he takes possession of, for further inquiry into the real character of herself and her cargo, with all reasonable indulgence; and it is the duty of neutrals under that possession, to take care that they do not put themselves in the condition of enemies, by resorting to such conduct, as can be justified only by the character of enemies. It is the law, and not the force of the parties, that must be looked to, as the redresser of wrongs, that may have been done by the one to the other.

Hence, where an attempt was made without arms and without bloodshed, to dispossess the captors, the ship and cargo were condemned (y), although the cargo was not the property of the owner of the ship (z). But when the crew, put on board a captured vessel, were unable to navigate her, and thereupon the captain resumed his command, and refusing to carry the vessel into the port designated by the captors, continued her

(x) *The Maryanna*, 6 Rob. 29.

(y) *The Dispatch*, 3 Rob. 278; *The Washington*, 2 Acton, 30 (u).

(z) *The Franklin*, Lords, 2 Acton, 106.



course according to his own instructions; it was held, that this conduct did not amount to a rescue, nor render the ship, on that ground, liable to confiscation.

The duty of navigating the vessel to such port as the captors may please to direct is not imposed upon the master and crew of a captured vessel. They owe no service to the captors, and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it, from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their peril. In this case the captain performed a duty, which he conceived he owed to the owners. He would not act against their interest, nor did he attempt to prosecute their interest by any violence on his part or on the part of his crew. The captors, therefore, were left to pursue their separate interests; they were unable to navigate the vessel, and he resumed his command. In this case, the sentence of the Vice-Admiralty Court was reversed, and restitution was decreed (*a*). But where an enemy master, not being under parole, attempted to seize the vessel of his captor, it was held, that such conduct was not illegal in him, and would not affect neutral property on board his vessel (*b*).

The capture of ships within the territory of a neutral state, or within three miles of the coast, or the capture of ships beyond the territory by boats within the territory is illegal with respect to the neutral sovereign, but not with respect to the enemy. The privilege of territory will not of itself enure to the protection of property, unless the state from which that protection is due, steps forward to assert the right; it is not competent to the party to whom the property belongs, to avail

(*a*) The *Pennsylvania*, 1 Acton, 33; *vide* Consolato, c. 275, § 5, Capm. i. 276, Collec. Mar. p. 3.

(*b*) The *Catherina Elizabeth*, 5 Rob. 232.

himself of that plea (c). Where a capture was made within three miles of the mud islands lying at the mouth of the Mississippi, and a claim was given by the United States alleging a violation of their territory, restitution was decreed (d). A vessel was claimed by the Prussian government on the ground of violation of Prussian territory, because it had been captured beyond the limits of the territory, by boats sent from a vessel lying within those limits. It was held, that no use of neutral territory for direct purposes of war is to be permitted. The act of sending out boats to make a capture, is an act directly hostile, not complete indeed, but inchoate and clothed with all the character of hostility. If this could be defended, it might as well be said, that a ship lying on a neutral station, might fire a shot at a vessel lying out of the neutral territory: the injury in that case would not be consummated nor received on neutral ground; but no one could say, that such an act would not be a hostile act, immediately commenced within the neutral territory. It signifies nothing to the nature of the act, whether I send out a cannon-shot, which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance. It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins in the latter case with the launching and manning and arming the boat, that is sent on such an errand of force. It is not sufficient to say, that the act of hostility is not completed on neutral ground; you are not to take any measure there that shall lead to immediate violence; you are not to avail yourself of a station on neutral territory, making as it were a vantage ground of the neutral country, which is to carry itself with perfect equality between

(c) *The Purissima Conception*, 6 Rob. 47; *Etrusco*, 3 Rob. 162 (n); *The Eliza Ann*, 1 Dod. 244.

(d) *The Anna*, 5 Rob. 373.

both belligerents, giving neither the one nor the other any advantage. Every government is perfectly justified in interposing to discourage the commencement of such a practice, for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds restitution was decreed (*e*). Acts of violence by one enemy against another are forbidden within the limits of a neutral territory, unless they are sanctioned by the authority of the neutral state, which it has the power of granting to either of the belligerents, subject of course to a responsibility to the other. A neutral state may grant permission for such acts beforehand, or acquiesce in them after they shall have taken place: or it may step forward and claim the property. To give effect to a claim of this kind it must be shewn, that the party making it was in a state of clear and indisputable neutrality at the time when the capture was made. If he has shewn more favour to one side than to the other; if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. A country shewing such an invidious distinction, is not entitled to claim in the character of a neutral state. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers, in which the essence of neutrality consists (*f*).

The right of capture is a belligerent right; but the same right is given in time of peace by many treaties respecting the slave-trade. It is impossible to enumerate here all the treaties upon this matter, and all the distinctions to which they are subject. But it may be proper to notice the Brazilian treaty, which is most important, for the purpose of adverting to a

(*e*) The *Twee Gebroeders*, 3 Rob. 162.

(*f*) *Per Cur.* The *Eliza Ann*, 1 Dod. 244.

misapprehension, which appears to prevail respecting it. It has been most erroneously supposed, that Great Britain has arrogated to itself powers under this treaty, which it does not confer. If a state should think fit to expose itself to the suspicion of insincerity, by not insisting upon the rights which it possesses under a treaty: it would not follow, that the mitigated powers which it may choose to substitute, are illegal, because they are inadequate. A state is at liberty to restrict its exercise of powers conferred upon it by a treaty; and if the power which it exercises, is included in those conferred, it cannot be illegal. Piracy is an offence defined by the common law of nations. Where the law of any state provides, that persons doing certain things shall be deemed and treated as pirates: that provision can only be enforced by the tribunals of such state against its subjects: for the rest of the world are strangers to that law. For the same reason, when the like provision is contained in a treaty, it can only be enforced by the high contracting parties against the subjects of any of them found offending on the high seas, or within their respective territories. Where it is intended that such provision shall only be enforced by each contracting party against his own subjects, it is requisite to add proper words to restrain the natural construction of such a treaty: as for instance, that they shall be deemed and treated as pirates, according to the laws of each of the contracting parties respectively. Where no such words are added, they are liable to be treated as pirates, according to the common law of nations by any of the high contracting parties, where they are found committing the acts described upon the high seas. The treaty of Rio de Janeiro between Great Britain and Brazil, 13th March, 1827 (*g*), reciting the obligation of the contracting parties, to give full effect to the stipulations subsisting between Great Britain and Portugal, for the regulation and

final abolition of the African slave-trade, so far as these stipulations are binding upon Brazil: and to fix and define the period at which the total abolition of the said trade, so far as relates to the dominions and subjects of the Brazilian empire, shall take place; provides, Article L, that at the expiration of three years, to be reckoned from the exchange of the ratifications of the present treaty, it shall not be lawful for the subjects of the Emperor of Brazil to be concerned in the carrying on of the African slave-trade under any pretext, or in any manner whatever; and the carrying on of such trade, after that period, by any person, subject of his Imperial Majesty, shall be deemed and treated as piracy. By the legal effect of this article, the British government were empowered to give instructions to their cruisers to seize as pirates, and to bring in for adjudication, by Courts having jurisdiction over the offence of piracy by the common law of nations, all subjects of his Imperial Majesty found on the high seas carrying on the African slave-trade, after the expiration of the period limited by the treaty. The Brazilian government expected that course of proceeding, and applied to the British government, to admit a distinction in favour of those who would be liable to be treated as pirates under the treaty, when they had loaded their cargoes before the expiration of the period assigned (*h*). The British government acceded to this application. It was to be expected, that those in whose favour no such excuse could be set up, would be treated as pirates according to the provision of the treaty and the common law of nations. But this was not the course pursued; and whatever may be thought of the efficacy of that which was substituted, there can be no doubt of its legality, because it asserted less than the treaty authorized, and asserted nothing that is not authorized thereby.

(*h*) Letter of the Brazilian Minister, the Chevalier de Mattos, to the English Secretary for foreign affairs, dated the 4th of October, 1830; Portaria of the Brazilian government, 4th November, 1829, signed by the Marquis of Aracaty.

The second article of the treaty, reciting the necessity of providing for the regulation of the trade until the time of its final abolition, incorporates for that purpose the provisions of the treaties between Great Britain and Portugal of the 22nd of January, 1815 (*h*), and the 28th of July, 1817 (*i*), and the several explanatory articles annexed thereto.

The third article provides, that all matters and things contained in those treaties, together with the instructions and regulations, &c., shall be applied *mutatis mutandis*, as effectually as if they were recited therein; confirming and approving thereby all matters and things done by their respective subjects under the said treaties, and in execution thereof.

The treaties referred to provide for the effectual protection of the lawful slave-trade of Portugal, and the suppression of its illicit trade; that is to say, for the protection of its trade south of the equator, and the suppression of such trade to the north of the equator. A separate article of the 17th of September, 1817, incorporated by reference in the treaty of the 28th of July, provides, that as soon as the total abolition of the slave-trade for the subjects of the Crown of Portugal shall have taken place, the two high contracting parties do hereby agree to adapt to that state of circumstances the stipulations of the convention of the 28th of July; but in default of such alterations, the convention of that date shall remain in force until the expiration of fifteen years from the day on which the general abolition of the slave-trade shall so take place on the part of the Portuguese government.

The Brazilian government construed this article, as if the words Brazilian subjects were to be substituted therein for the subjects of the crown of Portugal; and the provisions, relating to an indeterminate period of abolition, under indeterminate conditions, were applicable to the determinate abolition contained in the Brazilian treaty with the express provision, that

(*h*) Hertzlet, ii. 73.

(*i*) Hertzlet, ii. 81. 121.

the carrying on of the slave-trade by Brazilian subjects, after the expiration of the period assigned, should be deemed and treated as piracy. Admitting the correctness of the Brazilian exposition, which is at least doubtful, the utmost result is, that the treaties of the 22nd of January and the 28th of July, with all the machinery founded thereon, for the regulation of the lawful and the suppression of the illicit trade, expired between Great Britain and Brazil at the expiration of fifteen years from the period assigned. But that circumstance will not affect the validity of that first article, which has no relation to those conventions, and is altogether independent of them. The British government, instead of acting upon that article to its full extent, thought fit to restrict the exercise of its conventional rights, and obtained an act of Parliament, whereby the proceedings of those Courts, which would have jurisdiction to deal with the persons and ships and goods of Brazilian subjects on the high seas, carrying on the slave-trade in violation of that article, as of pirates by the common law of nations according to the legal effect of that article, were confined to the forfeiture of their vessels and cargoes engaged in such offence (*k*).

Thirdly, Of title to freight. A neutral vessel has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication. A neutral vessel so employed is entitled to her freight as a lien attaching to the cargo. The captor takes cum onere. The freight attaches as a lien, which he must discharge by payment, provided, as it must always be understood, that there are no unneutral circumstances in the conduct of the ship to induce a forfeiture of this demand (*l*). Where a neutral vessel is

(*k*) 8 & 9 Vict. c. 122.

(*l*) *Per Cur.* The Bremen Flugge, 4 Rob. 90; Consol. c. 275, Capm. p. 274, Coll. Mar. i. § 2; Alberic. Gent. Ad. Hisp. i. xxviii.; Heinecc. de Nav. viii.; Bynk. Q. J. P. i. xiv.

brought in on account of the cargo, the vessel is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo. When such an incapacity on the part of the cargo occurs, the owner has done his utmost to carry his contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract has not been performed (m). Freight is in all ordinary cases a lien, which is to take place of all others. The captor takes cum onere. It is the allowed privilege of a neutral to carry the property of the enemy, subject to its capture, and the temporary detention of his vessel: and if he does not prevaricate or conduct himself in any respect with ill faith, he is entitled to his freight (n). When a Danish vessel was taken on a voyage from the port of one enemy to the port of another, freight was given. In the case of vessels engaged in the coasting trade of the enemy the Court does not give freight, because that trade belongs peculiarly and exclusively to the enemy; but this rule has not been applied to voyages from the port of one enemy to the port of another, where there have not appeared any fraudulent or false proceedings in the conduct of the ship. This sort of traffic from one of his ports to the ports of another country has always been open, and is in its own nature subject to the uses of all mankind, who are not in a state of hostility with him. The Dane has a perfect right in time of peace to trade between Holland and France, to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war (o). Though the rule in ordinary cases is, that freight is a lien which takes place of all others; it has been held, that that general rule

(m) *Per Cur.* The *Fortuna*, Edw. 56.

(n) The *Vrouw Henrica*, 4 Rob. 347.

(o) The *Wilhelmina*, 2 Rob. 101 (s).



may be altered by circumstances ; that there is a class of cases to which it ought not to be applied, namely, that of ships carrying on trade between the ports of allied enemies. This is a trade which may be said to arise in a great measure out of the circumstances of the war, though not altogether, because such a trade exists, in a limited degree, in time of peace. In such a course of trade, although the Court has not altogether refused freight, it may not think it unreasonable that the captor should in preference be entitled to his expenses, inasmuch as the nature of such a trade cannot but very much influence the judgment which he must unavoidably form of his duty to bring in the cargo for adjudication. There is a middle case, that of a voyage not between the ports of allied enemies, but between the ports of belligerents. In such a case, there may be a presumption that the property belongs to the enemy exporter ; but there is a foundation also for presuming that it may belong to the consignee, and that it could not have been sent to a belligerent country except under the protection of a license. In this case the Court allowed freight to take precedence of all expenses, except the law expenses of the captor (*p*). Where neutral ships had been brought in on account of their cargoes, which had been released on bail to answer freight and expenses, and before any decree pronounced the neutral country of the ships had become hostile, and by an order in council all freight become due or payable to subjects of that country was forfeited to the Crown ; it was held that the Crown succeeded to the rights of the owners of the ship ; that the acceptance of bail was merely substituting one security for another, and was not intended to place the owner of the ship, who has a lien on the cargo, in a worse situation ; that the acceptance of bail does not alter the nature of his right, nor deprive him of his legal remedy ; and he must be considered in law, though not in fact, to be still in possession of the cargo. It was held, that the Crown being substituted for the owner of

the vessel, had the same right, and was entitled to freight (*q*). When the Crown takes to itself the rights of one of the parties against the other, so far as they arise out of the same individual transaction, it is to the same extent bound by the obligations of that party towards the other; and, therefore, where a sum had been advanced on bottomry to enable the ship to continue its voyage; it was held, that without breaking in upon the principle that the Crown is not to regard latent remote claims of third parties arising on foreign transactions, the sum of money so advanced ought to be deducted from the freight (*r*). Where a ship was stopped at the mouth of the port of her destination by a blockading squadron, and blown out to sea and captured, and then recaptured and carried by the recaptors to a distant port, and there sold at a great loss to pay salvage; it was held, that as the incapacity to complete the voyage could not be exclusively attributed either to the owner of the ship or to the owner of the cargo, since the ship could not have entered the interdicted port in ballast any more than the cargo could have entered it in any other vehicle, equity required that the loss should be divided, and the payment of a moiety of the freight was decreed. Where a ship chartered to Lisbon was captured on her return voyage off Falmouth, and afterwards recaptured and carried into Falmouth, and the cargo was not decreed to be restored till some months after the restitution of the ship, which sailed without the cargo, the ship was held entitled to the whole freight, subject to a deduction of one-eighth for salvage (*s*). Where a ship bound from Liverpool to Halifax and the West Indies and back was captured, and recaptured and brought back to Plymouth, and it appeared that by the terms of the charter party no freight was to become due till the ship arrived at Halifax; it was held, that both upon principle and practice, and from the fair sense of the particular

(*q*) *The Prosper*, Edw. 72.

(*r*) *The Constantia*, Edw. 232.

(*s*) *The Racehorse*, 3 Rob. 101; *The Martha*, *ibid.* (*n*).

contract between the parties, no freight was due (*t*). Where a ship and cargo on a voyage to London was captured and carried into Plymouth, and entitled to restitution because protected by a license, the ship was directed to be restored with freight and expenses on her arrival at the port of her delivery (*u*). Where a ship justifiably captured, but not liable to condemnation, was lost by the culpable negligence of the prize master; it was held, that if the loss had happened by accident only in bringing in, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight or for the ship; but in this case the freight being as much a part of the loss as the ship, he was bound to answer equally for both, since by taking possession of the cargo he had deprived the claimant of the fund to which his security was fixed. Restitution in value of the whole freight was decreed (*v*). Where a ship is decreed to be restored with freight, and the cargo is of a perishable nature, the Court will decree the sale of so much of the cargo as is necessary to discharge the freight (*w*). Where restitution of the ship and cargo was decreed without any fault on the part of the captor, and the value of the cargo was insufficient to pay the freight, it was held that the captor was not liable (*x*). Where a ship was restored with freight, and a commission of unlivery was taken out, and the cargo was restored before the unlivery was completed, and the master refused to carry on the cargo without a new agreement; it was held, that the act of unlivery was binding on the parties, and must be taken to be decisive in producing a complete dissolution of the contract, and that freight was due notwithstanding the refusal (*y*). Where a ship in dis-

(*t*) *The Hiram*, 3 Rob. 180.

(*u*) *The Wilhelmina Eleanor*, 3 Rob. 234.

(*v*) *The Der Mohr*, 4 Rob. 314.

(*w*) *The Vrouw Margaretha*, 4 Rob. 304 (*n*).

(*x*) *The Haabet*, 4 Rob. 302.

(*y*) *The Hoffnung*, 6 Rob. 231.

treas coming into a British port was seized, and it became necessary to tranship the cargo to repair the vessel, and afterwards both ship and cargo were restored: it was held, that the maxim, that capture is delivery, is only true when the captor succeeds to the full rights of the enemy, and represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captain pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet, as the captor by his act of seizure, has prevented the completion, his seizure shall operate to the same effect as the actual delivery of the goods to the consignee, and shall subject him to the payment of freight. But if the ship and cargo, being both neutral, are restored, the consequence is only, that the ship must proceed and complete her voyage before she can demand her freight. If the cargo is restored while the ship continues under detention, still less reason is there to contend that she has earned her whole freight. In this case the ship failed in her contract, not owing to the cargo in any manner, but to her own state of distress originally, and afterwards to her dubious character. Under these circumstances, payment of freight *pro ratâ itineris peracti* was decreed (z).

Where a ship, bound to Maderia, was captured and recaptured, and a prize master put on board to navigate her to England, but the ship was obliged to put into Corunna in distress, being unfit to continue her voyage, and the cargo was there sold; it was held, that no freight was due (a). So where a ship was detained by embargo, to which the cargo was not liable, and the cargo having been brought out of its course, and detained on account of the ship, was finally compelled to find another vehicle to convey it to its market (b). An em-

(z) *The Copenhagen*, 1 Rob. 289.

(a) *The Louisa*, 1 Dod. 317.

(b) *The Worldsborgaren*, 4 Rob. 17; *The Isabella Jacobina*, 4 Rob. 77.

bargo, which renders it impossible for a master to perform his contract of affreightment, discharges the lien which he has upon the cargo for his freight (*c*). Freight is forfeited by unneutral conduct. Thus, ships engaged in a privileged trade of the enemy, by which he is relieved from the pressure of war, are not entitled to freight, as vessels sailing on a voyage in the coasting trade of the enemy (*d*), or between the mother country and its colony (*e*). So a ship is not entitled to freight for contraband articles (*f*); and the master is not permitted to aver his ignorance, for in time of war he is bound to know the contents of his cargo (*g*). So where a vessel was carrying a cargo partially protected by a license, freight was refused for so much of the cargo as was within the protection (*h*). But freight was allowed on a cargo condemned as engaged in the coasting trade of the enemy, with papers purporting a destination to a neutral port, whence the voyage had been continued by the owner of the cargo; where it did not appear, that the owner of the ship was privy to the fraudulent prolongation of the voyage (*i*). But where a ship is sailing with a false destination, freight is forfeited, unless the owner of the ship can shew clearly, that he has been duped by the fraud of the master (*k*).

With respect to the mode of estimating the freight between the captor and the owner of the ship, the principle is, that it

(*c*) The *Theresa Bonita*, 4 Rob. 236; The *Isabella Jacobina*, 4 Rob. 77.

(*d*) The *Atlas*, 3 Rob. 304; The *Emanuel*, 1 Rob. 296.

(*e*) The *Rebecca*, 2 Rob. 101; The *Immanuel*, 2 Rob. 186. As to the *Immanuel* and the *Rose*, *quære*; these seem to be cases in which the ship is confiscable.

(*f*) The *Sarah Christina*, 1 Rob. 242; The *Mercurias*, 1 Rob. 288.

(*g*) The *Oster Risoer*, 4 Rob. 199.

(*h*) Th *Jonge Clara*, Edw. 371.

(*i*) The *Ebenezer*, 6 Rob. 250.

(*k*) The *America*, 3 Rob. 36.

is to be estimated on the footing of a reasonable mercantile profit. Where a ship is carrying on an ordinary trade, the charter party is the rule of valuation, unless it can be impeached as colourable and fraudulent. But a different rule is to be applied, where the trade is subjected to extraordinary risk and hazard, from its connection with the events of war, and the activity and success of the enemy's cruisers. The captor is not in all cases bound to the chartered price, though not impeached by the real prices of the market. When, by the events of war, navigation is rendered so hazardous, as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflamed rate of freight (*1*). The expenses of the neutral master do not stand upon the same footing as freight, but are postponed to the expenses of the captor. On principle, a neutral ship can carry the property of the enemy, only on condition of being liable to be brought in for adjudication of her cargo, and would not be entitled to the expenses of being so brought in. Putting practice out of the question, which has established a more indulgent rule, it does not appear, that the neutral master would, on principle merely, be entitled to an indemnification for expenses so incurred. He is bound to know the condition annexed to his right, and to abide the consequences. A more favourable practice has obtained, under which his expenses are usually allowed; and this practice is sustained so far as it does not interfere with other rights equally protected by practice, and more strongly protected by principle. But it is not a claim, which the neutral master is entitled to urge against the captor, as a right equally original, and equally vested in him, and in the same manner as freight is invested, by the receipt of the cargo on board, and the performance of the contract of conveyance. When a cargo is condemned on further proof, the captor is as much entitled to his expenses, as if the cargo had been condemned

(1) The Twilling Riget, 5 Rob. 82.

in the first instance upon positive evidence, that it was the property of the enemy; and the captor's expenses are entitled to priority over those of the master (*m*).

A captor is entitled to freight on a neutral cargo in an enemy's ship, when he carries the cargo to its original port of destination. This rule is conformable to the text law (*n*), and the opinion of the most eminent jurists. *Quod additur de vecturæ pretiis solvendis*, says Bynkershoek (*o*), *ejus juris rationem non adsequor*. *Satis intelligo, qui navem hostilem occupant etiam occupâsse omne jus, quod navi sive navarcho debebatur ob merces translatas in portum destinatum. Proponitur autem navem in ipso itinere fuisse captam. Ecce igitur capienti solvam mercedes? Si qui cepit navem, eam cum mercibus in locum destinatum perducere paratus sit, ejus juris rationem intelligerem, alioqui non intelligo*. In the case of the *Vryheid* (*p*), all the considerations that could be applied to this question were fully canvassed; and it was there recognised as the true rule, that the captor who has performed the contract of the vessel, is, as a matter of right, and of course entitled to freight; although, if he has done any thing to the injury of the property, he may remain answerable for the effect of such misconduct or injury in the way of set-off against him. Hence, where a captor carried a cargo to Lisbon, the port of destination, and the consignee was put into possession informally, and apparently without a shadow of right by the hand of the Portuguese government; and the cargo was sold and the proceeds left in the hands of a Portuguese house, with consent of both parties, till sentence of final adjudication; it was held that the captor was entitled to freight, and that his interest was not forfeited, although the proceeds under these circumstances had not been paid into Court, so soon as

(*m*) *The Brummen Flugge*, 4 Rob. 90.

(*n*) *Consolato*, c. 273, § 7, *Coll. Mar.* 4.

(*o*) *Q. J. P.* i. xiii.

(*p*) *Lords*, 23rd April, 1784.

they ought to have been in the regular course of practice (*q*). There are two rules on this subject equally general. The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight shall not be due: and on this ground, that the contract not being completed either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost, and the party has to provide another vehicle to carry on the goods to the port of their destination. In some cases indeed it may happen, that the port to which goods are brought, may prove more beneficial, and afford a better market. But the Court does not enter into the minutiae of such calculations, which would be attended with great trouble in the inquiry, and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule, that in such a case the claimant shall receive restitution of his goods without the burthen of freight. The other rule is equally general, that when the contract is executed by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is entitled to the price of the services which have been performed in the execution of the contract. In some instances it may prove disadvantageous to the claimant; and it is certainly a clear inconvenience to be obliged to receive the goods under the process of a Prize Court, subject to the expenses which may have been incurred, or to the delay of further proof, instead of taking them with more facility in the course of their original consignment. But on the same principle, the Court declines on this side also to enter into a minute estimate of these circumstances, which must in every case branch out into infinite variety. It constructs a general rule on the same grounds of presumption,



which it assumes on the other side; and decrees freight to be paid to the captor in the same manner, as if the goods had been delivered under the original consignment. It cannot be expected that the merchant in time of war should obtain possession of his goods seized, with exactly the same convenience as he would have done under the original consignment in time of peace; and when none of the accidents of war had intervened to interrupt the delivery. Where Dutch colonial produce, the property of British merchants removing their property at the commencement of war, was destined to Holland, under the compulsion of Dutch ordinances, with a final destination to England, either in specie or in proceeds, and was captured on board a Dutch vessel and brought to London; freight was held to be due to the captors, on the ground that the delivery was made ultimately at the port of original election (*r*). So where the goods were delivered at Plymouth (*s*). But property restored to foreign claimants, was held not to be liable to freight (*t*). And when, after restitution, to foreign claimants, they elected to sell the cargo in England; it was held, that the accidental advantages of such a sale would not support a claim for freight on the part of the captors (*u*).

Fourthly. Of costs, damages, and compensation. Where a seizure is justifiable, the captor in case of restitution, is entitled to costs from the claimant (*v*). Though restitution is given; a seizure is justifiable, where there is probable cause to suspect, that the ship or any part of the cargo is liable to condemnation; as where a ship is trading between the ports of the enemy (*w*), or between the port of one enemy and that of another, or between the ports of two belligerents (*x*); when

(*r*) *The Diana*, 5 Rob. 67.

(*s*) *The Vrouw Henrietta*, 5 Rob. 75, (*n*).

(*t*) *The Hoop*, 5 Rob. 75, (*n*).

(*u*) *The Vrouw Anna Catherina*, 6 Rob. 209.

(*v*) *Per Cur.* *The Speculation*, 2 Rob. 296.

(*w*) *Ibid.*

(*x*) *The Vrouw Henrica*, 4 Rob. 343.

the ship's papers do not shew the neutral character of the ship or cargo: or where there is just ground for believing the papers to be false: or that the ship in its outward voyage has committed a breach of blockade; or is navigated with intent to commit such a breach, or has carried contraband on her outward voyage.

When English merchants had resorted to the expedient of protecting their trade against the enemy by false papers, which caused a variation between the shipment and the claim, by which further proof was rendered necessary; it was held that the captors ought not to be answerable for the expenses, into which they had been led by this expedient, and their expenses were directed to be paid (y). Where a ship and cargo belonged to the same claimant, who refused to accept restitution of the ship without the cargo; and further proof was ordered as to the cargo, and a commission of unlivery passed as of course, whereof the execution was stayed on the first intimation of objection on the part of the claimant; and the allowance of the captor's expenses was opposed, on the ground that the cargo had been deteriorated by unlivery; it was held, that no blame was to be imputed to the captors, and the expenses of further proof were allowed (z). Where in a case of justifiable seizure, charges were incurred in consequence of the subsequent misconduct of the captor, in conveying the vessel to his own port, which was not fit for its reception, those charges were deducted from the expenses allowed to the captor (a). Costs are very much within the sound discretion of the Court, with reference to all the circumstances that may be fairly collected respecting the conduct of the parties. Where a vessel having been captured and released by consent, was seized by a second captor, with a copy of the sentence of restitution on board, and a second time released without

(y) *The Sarah*, 3 Rob. 330.

(z) *The Polly*, 2 Rob. 371.

(a) *The Principe*, Edw. 70.

further proof; but it appeared, that every person of any station of authority with respect to the ship or cargo, was implicated in concerting fraud against the rights of the belligerent, though not with respect to the actual transaction, but to an ulterior voyage; and that the measures adopted for that purpose were the cause of bringing the case a second time to adjudication; the Court held, that it was justified in holding out this wholesome lesson to neutrals, that persons conducting themselves in such a manner should be made subject to the payment of costs (*b*). Where a cargo restored was taken by government by right of pre-emption, the captor's expenses were directed to be paid by government (*c*). Where an act of Parliament had passed vesting the custody of Dutch property in the ports of this kingdom, during the doubtful state of public affairs between England and Holland, in commissioners appointed by government; and a ship and cargo taken after the commencement of hostilities was carried into Bermuda, where the ship and part of the cargo was restored; but the remainder was ordered by the Court to be sent to England, and delivered to the commissioners, by whom it was received; it was held, that the captor's expenses would not include the charge of conveyance to England: and that the commissioners were liable to the neutral claimant in place of the actual captors, whom they had dispossessed. The merchant, whose goods were seized, had a right under the general law of nations to an adjudication of his property in Bermuda. The property having been conveyed to Europe under the application of a novel policy framed for the particular convenience of the British government, the expenses of that transmission, and every expense intended to secure it, must fall upon the party, for whose convenience this was done; and the neutral claimants must be protected. Therefore the government, having dispossessed the captors, took the property with all

(*b*) *The Eliza and Katy*, 6 Rob. 185.

(*c*) *The Resolution*, 4 Rob. 166, (*n*).

their responsibility, and became liable for any deficiency that had occurred, even before the captors were dispossessed; but if the sale had been improved by the transmission of the property, the claimant would be equitably liable for a share of the expenses of transmission (*d*). Captor's expenses are forfeited by wrongful detention. Thus where a ship was justifiably seized, but the case appeared from the papers to be clearly a case for restitution, which afterwards passed by consent, but that consent had been unnecessarily delayed for two months, captor's expenses were refused (*e*). So, where there appeared reason to suspect management and tampering with the evidence on the part of the captors, and a deposition was taken irregularly by them and introduced out of due time (*f*). Where a ship was seized for an alleged breach of blockade, which was not proved to exist *de facto*, by a cruiser, which was not one of the squadron that had been employed on that service; it was held, that the captor was not entitled to his expenses (*g*). But where a vessel was justifiably seized, and the case required a great deal of special information, which was not given by the claimants so promptly as it ought to have been, the captor's expenses were allowed (*h*).

Where a capture is not justifiable, a captor is answerable for every damage (*i*). Where a ship, unjustifiably captured, was lost on her way to England, the captor was held liable in costs and damages (*k*). Where there was no justifiable cause of seizure, costs, damages, and demurrage were allowed to the claimants (*l*). Where a capture is justifiable, a captor is only responsible for due diligence (*m*). It is not a correct

(*d*) *The Narcissus*, 4 Rob. 17. 20.

(*e*) *The Zee Star*, 4 Rob. 71.

(*f*) *The Speculation*, 2 Rob. 293.

(*g*) *The Christina Margaretha*, 6 Rob. 62.

(*h*) *The Juliana*, 4 Rob. 343.

(*i*) *Per Cur. The William*, 6 Rob. 316.

(*k*) *The Nemesis*, Edw. 50.

(*l*) *The Triton*, 4 Rob. 78.

(*m*) *Per Cur. The William*, 4 Rob. 316.

position, that where due diligence is required, captors are answerable only for such care as they would take of their own property. This is not a just criterion in such a case. For a man may, with respect to his own property, encounter risks from a view of a particular advantage, or from a natural disposition to rashness, which would be entirely unjustifiable with respect to the custody of goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property may be considered as a reasonable criterion. But in cases of capture there is no confidence reposed, nor any voluntary election of the person, in whose care the property is left. It is a compulsory act of justifiable force, but still of such force as removes from the owner any responsibility for the imprudent conduct of the prize master. It is not enough, therefore, that a person in that situation uses as much caution as he would use about his own affairs. The law requires that there should be no deficiency of due diligence. Hence, where the prize master refused to take a pilot, and the ship and cargo were lost, restitution in value was decreed (\*). But where there is a regular pilot on board, and the persons under him do their duty, and it is not shewn, that the damage has arisen from want of obedience in them, or from any cause assignable to the want of that control, which the captor is bound to exercise over the crew, the captor is exonerated. It was objected to this rule, that it might be a grievous hardship on the owner to have the responsibility for the loss of a valuable ship turned over to a pilot, who may be a person of no substance. But the Court held, that there was nothing in this objection to justify a distinction, and to throw back the responsibility on the captors, who are chargeable with nothing but the appointment of one

(\*) The William, 6 Rob. 319; The Der Mohr, 3 Rob. 129.

of the established pilots, of whose qualification they are not judges. Where captors have taken the precaution of putting a pilot on board, they are exonerated from any accident occurring in the navigation of the vessel (*o*).

A captor is not entitled to send his prize to any port, that he may choose to select. It must be a convenient port; and in that consideration, the convenience of the claimant in proceeding to adjudication is one of the first things, to which the attention of the captor ought to be addressed. Hence, where a vessel was justifiably seized, but delay was incurred in consequence of the vessel being sent to Shetland, instead of Leith or Berwick, or any of the principal northern ports of the kingdom, demurrage and the expense of hearing a petition for costs and damages were allowed (*p*). The first duty of captors, according to the instructions, is to bring their prize to some convenient port. Convenient is a large and general term, leaving a certain latitude of discretion, but a discretion to be cautiously exercised, and with reference to the view, which the Crown itself must be supposed to have entertained in issuing the instructions. Conveniences are of different kinds; some of a slighter nature, some almost indispensable. Among the most important, must be considered that of bringing the vessel to a port, where she may lie in safety, since that cannot unquestionably be deemed a convenient port, which does not afford security and protection to the property, that is brought in. An open road, for instance, where the ship may be occasionally exposed to the weather, cannot be a place of security. It is, therefore, quite impossible that it should be considered as a convenient port for the preservation of property. Another material ingredient of convenience will be, that the port should be of sufficient capacity to admit vessels to enter without unloading their cargoes; since it is the intention of the Legislature, that bulk shall not be broken. Captors

(*o*) The Portsmouth, 6 Rob. 317, (*n*).

(*p*) The Wilhelmina, 5 Rob. 143.

are not to meddle with the cargo in any manner, without the authority of the Court, which cannot be exercised until the vessel has been brought into port. It is also highly desirable, that the port should be a place, which holds ready communication with the tribunals, which have to decide on questions arising out of the capture; that the parties may have access to advice, and be enabled to obtain the necessary information; and that the directions of the Court of Admiralty may be carried into effect with despatch. These are the leading points of consideration, and may be deemed indispensable. On the other hand, there may be conveniences, of a subordinate nature, in favour of the captor, which may be also very deserving of attention, where they do not interfere with those of higher moment. For instance, that owners of privateers may elect their own port is but a reasonable advantage in itself, when kept within proper limits, and not suffered to predominate over the interests of other persons, and more especially over those general purposes of public justice, to which the Court is principally bound to attend. The privilege of electing their own ports is a convenience, which may be allowed *cæteris paribus*. And it is one, in which the Court will be disposed to support them, when it does not become the cause of greater inconvenience to others. But the just limits of this personal accommodation are to be distinctly observed; it is not an object to be pursued indiscriminately for the mere profit of agency and commission, in the neglect of other considerations of higher or more general importance. Where a vessel was taken to Jersey, which was not a port fit for the reception of such a vessel, which was not safe in the outer port, and could not be taken into the inner port without breaking bulk, and the captors proceeded to unliver the cargo, they were held liable for the damage sustained (*q*). Where a vessel was taken to Lisbon and unnecessarily detained there

(*q*) *The Washington*, 6 Rob. 275.

for six weeks, costs and damages were given, though an offer to release on bail had been refused (*r*). Where a vessel coming into port in distress was seized as droits of Admiralty, and no proceedings were taken for three or four months, during which time she was exposed with a valuable cargo in an open bay on a lawless coast in the winter season, payment of demurrage and damages was decreed against the scizor. In this case considerable damage had accrued in consequence of proceedings being instituted before an incompetent tribunal; it was held that the claimants were entitled to compensation for that damage. This gave rise to the question, how far the Crown, acting not on its own prerogative rights, but in the office of Admiralty, can be made answerable for damages accruing to property in the hands of its officers. It became unnecessary to decide this question, as the officers of the Crown undertook that the government would attend to the recommendation of the Court (*s*). Where a ship justifiably captured was detained, to enable the government to exercise their option of pre-emption, demurrage to be paid by government was allowed (*t*). In case of unjustifiable delay in proceeding to adjudication, the captor is liable for demurrage (*u*). Where a merchant ship, that had taken on board the crew of a stranded frigate, was proceeded against as prize and restored; freight, expenses, and demurrage were allowed (*v*). But where demurrage was claimed against the owners of the cargo, and it appeared that the ship, which had been seized on coming into port in distress, was in want of repairs, and that the proof of the neutral character of the ship took up more time than that of the cargo, it was held that there was no pretence for such a claim (*w*). Where

(*r*) *The Peacock*, 4 Rob. 185.

(*s*) *The Madonna del Burso*, 4 Rob. 169.

(*t*) *The Zucheman*, 5 Rob. 152.

(*u*) *The Corier Maritimo*, 1 Rob. 287; *The Zec Star*, 4 Rob. 71.

(*v*) *The Jonge Jacobus*, 1 Rob. 243.

(*w*) *The Copenhagen*, 1 Rob. 289.



no proceedings were taken for a month after the captured vessel was brought into port, and the hearing was delayed by opposition on the part of the captors for another month, two months' demurrage was allowed; and unnecessary severity having been used towards the crew, one hundred pounds was awarded to be distributed amongst them as compensation (*x*). Where a vessel sustained injury by striking against a rock, owing to the wilful neglect of the prize master in refusing to take a pilot, and it was imputed to the prize master, and not denied, that he had been in a continued state of intoxication, and guilty of great cruelty and misbehaviour to the crew of the captured vessel, costs and damages were given, and a sum of one hundred guineas awarded as compensation to the crew (*y*).

By the treaty between England and the States General, 19th February, 1674, article 14, it is agreed, that whereas the masters of merchant ships, and likewise the mariners and passengers, do sometimes suffer many cruelties and barbarous usages when they are brought under the power of ships, which take prizes in time of war, the takers in an inhuman manner tormenting them, thereby to extort from them such confessions as they would have made, both his Majesty and the Lords the States General shall, by the severest proclamations or placards, forbid all such heinous and inhuman offences, and as many as they shall by lawful proofs find guilty of such acts, they shall take care, that they be punished with due and just punishment, and which may be a terror to others; and shall command that all the captains and officers of ships who shall be proved to have committed such heinous practices, either themselves or by instigating others to act the same, or by conniving while they were done, shall (besides other punishments to be inflicted proportionably to their offences), be forthwith deprived of their offices respectively; and every ship brought up as prize whose mariners or passengers shall have suffered any torture, shall

(*x*) The St. Juan Baptista, 5 Rob. 33.

(*y*) Die Fire Damer, 3 Rob. 357.

forthwith be dismissed and freed, with all her lading, from all further examination and proceedings against her, as well judicial as otherwise (*z*). A similar provision is contained in the thirty-ninth article of the commercial treaty of Utrecht, between England and France (*a*).

When, after restitution decreed, the cargo is found to be deficient, the captors will be decreed to make good the deficiency (*b*). But where the sale of the cargo produced less than its value, but there was no irregularity or unfairness of conduct on the part of the captors; it was held, that they were not liable for the deficiency (*c*). Where a claim for damages on the ground of embezzlement was referred to the registrar and merchants, and, before their report was received, the claimant had become an alien enemy, the Court, on the petition of the British agent of the claimant, directed the sum found to be due to be brought into the registry, to be at the disposal of the Crown, on the supposition that it would not be difficult to obtain a license to enable the claimant to take it out as a reparation for the injury, which the Court had pronounced him to have received (*d*). Where restitution in value was decreed, and the owner of the ship was also owner of the cargo; it was held, that he was entitled to freight, as well as to a fair mercantile profit on the value of the cargo. If freight is paid separately, when the owner of the ship is not the owner of the cargo, it is equally due when one person is the owner of both (*e*).

A bonæ fidei possessor is not responsible for casualties; but he may by subsequent misconduct forfeit the protection of his fair title. When a ship of Hamburg taken erroneously as

(*z*) Chalmers, i. 186.

(*a*) Chalmers, i. 411.

(*b*) The Concordia, 2 Rob. 102.

(*c*) The Two Susannahs, 2 Rob. 132.

(*d*) The Purissima Conception, 5 Rob. 357, (*n*).

(*e*) The Lucy, 3 Rob. 208.

Dutch, was retaken by a French privateer, and in going into Nantz was foundered and was lost; on demand for restitution against the British captor, the Lords of Appeal decided, that, as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French recaptor had a justifiable possession under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands; that if the property had been saved, the claimant must have looked for redress to the justice of his ally the French; but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. To make justifiable captors liable to compensation, in case of recapture by the enemy, the irregularities committed by them must be such, as would justly prevent restitution by the recaptors. Unless such circumstances are proved, the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held to exonerate the original captors (*f*). Where a vessel justifiably seized was lost by stress of weather, without any negligence on the part of the captors, it was held, that they were not liable for the loss (*g*). So, where goods were stolen out of a warehouse, where they had been lodged under a commission of unlivery, without any negligence on the part of the captor or his agents (*h*). So, where damage was sustained, owing to the place assigned by the officers of the government for the performance of quarantine, being unfit for a vessel of her form. But in this case a representation of the matter was directed to be made to the government as a damage fit to be redressed by them (*i*). Where an unconditional release has been accepted, it is too late for the claimant to demand costs and damages. Such a release must be un-

(*f*) *The Betsey*, 1 Rob. 93.

(*g*) *The Caroline*, 4 Rob. 256.

(*h*) *The Maria*, 4 Rob. 348.

(*i*) *The Freya*, 5 Rob. 75.

derstood to have been an absolute and unqualified proposal, and meant as a general acquittal on both sides. If there had been any intention to prosecute a demand for damages arising from the seizure, the offer should have been accepted *sub modo*: instead of that, the offer was accepted as it was proposed, and as such must be understood to include an act of amnesty on both sides. The claimant must take the inconvenience with the convenience of restitution. The offer of restitution being accepted unconditionally, must be considered as a discharge (*k*). But the owners of a privateer are in the first instance liable at the suit of the party injured; not merely for their own shares respectively, but for the total amount of what may be awarded against them all; and where a part owner had been released on payment of his share of the costs and damages, according to the proportion of his interest in the ship, a prayer for his dismissal from the suit of the claimant was rejected (*l*). Where a claim for damages for the destruction of a vessel after the termination of hostilities, was made against the admiral on the station, who was not privy to the act; it was held that he was not responsible, that the actual wrongdoer is the only person, that can be held responsible in the Prize Court, although he may have other persons responsible over to him. In this case all persons were in complete ignorance of the cessation of hostilities, not only those on board the king's ships, but the Americans, as well those on shore, as those on board the vessel. In the pursuit shots were fired on both sides, and it was alleged on the part of the British, that the ship was set on fire by her own crew, who took to the shore. Seven years after the event, a suit for damages was commenced in the Court of Admiralty against the commander of the king's ships; the Judge held, that the act of destruction took place under such circumstances, that

(*k*) The Maria, 6 Rob. 236.

(*l*) The Karasan, 5 Rob. 291; Strachan v. Morison, 1 Stair's Decis. 531.

the captor was not compellable to proceed to adjudication upon it. Against this judgment there was no appeal; but ten years afterwards a suit was commenced against the admiral of the station, with the same result (*m*). So, where a vessel captured after the period limited by a treaty of peace for captures in that longitude and latitude, by a captor having no means of obtaining information of that fact, was lost without any want of due diligence on his part (*n*). Where a captor is a bonâ fide possessor, using due care in the possession, he is not answerable for mere misfortune. That misfortune must fall where it immediately lights. A bonâ fide possession is that which is honestly taken under all the knowledge of rights, which the party had or could have had upon due and practicable inquiry. He may err, but he errs optimâ fide, if he acts honestly according to all the information he either has or could have procured. It is not sufficient for a party to plead ignorance as a legal excuse for making compensation to another for an act under which he has suffered; if his ignorance was vincible by himself, and ought not therefore to have existed at the time at which the transaction complained of took place. But this does not exclude liability on the part of the government of the captor, which would attach, if the government has not used due diligence in advertising the cessation of hostilities in the quarters and at the periods stipulated, if that were practicable. If it appeared that no want of due activity could be imputed, but that the conveyance of intelligence was not physically practicable; the question would arise whether the two governments had mutually bound themselves to answer to each other for mere casualties (*o*).

Regularly a captor is bound by the law of his own country, conforming to the law of nations to bring in for adjudication, in order that it may be ascertained, whether the vessel and

(*m*) *The Mentor*, 1 Rob. 179.

(*n*) *The John*, 2 Dodl. 336

(*o*) *Per Cur. Hond.*

cargo be enemy's property; and that mistakes may not be committed by captors in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. If it is impossible to bring in, the next duty of a captor is to destroy enemy's property; if it be doubtful, whether it be enemy's property, and impossible to bring it in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under such circumstances by a full restitution in value. These are rules so clear in principle, and so established in practice, that they require neither reasoning nor precedent to illustrate or support them. If a neutral or protected ship is destroyed by a captor, either wantonly or under an alleged necessity, in which she herself is not directly involved, the captor or his government is answerable for the spoliation. If an enemy's ship is protected by a license, and the captor knows of the license, either from its production, or from any other circumstances that ought to have satisfied him of its existence, he is liable to the whole extent of the mischief done. But if the existence of the license is not disclosed to him by those, whose duty it is to inform him, and he has no sufficient means to inform himself, he is not a wrongdoer. There is no case, in which the rule *de non existentibus et non apparentibus* can more justly apply, than where a man is called upon to answer for a loss occasioned by the act of concealment of the complainant himself. If a ship, armed with a protecting license, which is not produced or alleged at the time of the capture, is brought in, the Court would subsequently restore that vessel; but it would indemnify the captor to the utmost extent of all the expense he had been put to by that concealment or denial; and if a ship is justifiably destroyed under

an ignorance so produced, the Court owes the captor the same protection to the fullest extent. Hence, where a captor destroyed an enemy's vessel protected by a license, but the master had denied the possession of any license, and did not produce it till it was too late to prevent the destruction of the vessel; it was held, that the captor was not responsible (*p*). But where a protected vessel was unjustifiably captured, under an erroneous opinion that the license produced was invalid; and was destroyed, because the captor could not spare men to take her to a British port, nor allow her to go to her own port, because she would have furnished important information to the enemy; it was held, that these circumstances might make the destruction of the vessel a meritorious act, as far as the captor's government was concerned, but furnished no reason why the owner should be a sufferer; and restitution was decreed with costs and damages (*q*). Where the validity of the license was so far doubtful as to render the capture justifiable, simple restitution was decreed (*r*).

(*p*) *The Felicity*, 2 Dod. 381.

(*q*) *The Acteon*, 2 Dod. 48.

(*r*) *The William*, 2 Dod. 55.

## CHAPTER IV.

## OF THE RIGHT OF BLOCKADE.

EVERY belligerent has a right to blockade the ports of his enemy; but in order to render neutral vessels liable to the penalty which attaches to a breach of blockade, there must be, First, An actual blockade imposed by competent authority. Secondly, Notice thereof. Thirdly, A violation of the blockade. There remains to be considered, Fourthly, The penalty which attaches to a breach of blockade.

First, A blockade is an act of sovereignty; and the commander of a king's ship cannot extend it (a). But a commander going out to a distant station is presumed to carry with him such a portion of sovereign authority delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant parts of the world it cannot be disputed, that a commander must be held to carry with him sufficient authority to act as well against the commerce of the enemy, as against the enemy himself, for the more immediate purpose of reduction. The authority of a commander in an expedition will not be affected, as to any but his own government, by his having acted irregularly in entering upon it without orders.

(a) Henrick and Maria, 1 Rob. 148.



However irregularly he may have acted, the subsequent adoption of his acts by government will have the effect of legitimating them, so far as the subjects of other governments are concerned. In such a case, a blockade imposed by a commander could not be impeached on the ground of want of regular authority; and however irregularly he might be deemed to have acted towards his own government, it is that for which he is in no manner answerable to other states; and it is not open to the subjects of other states to dispute the validity of the blockade (*b*). A mere proclamation that a place is invested is insufficient to constitute a legal blockade (*c*). For that purpose, it is necessary that the place should be invested by a competent force. The parties, who formed the armed neutrality, understood blockade in this sense, and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter it (*d*). The West India islands were declared under blockade by Admiral Jarvis, but the Lords held, that as the fact did not support the declaration, a blockade could not be deemed legally to exist (*e*). A blockade commences from the time a force is stationed, to prevent communication (*f*). Where a vessel, coming out of a blockaded port, was captured by two armed ships, about seven miles from the coast, it was argued, that there was no blockade *de facto*, and that this small number of vessels only was a proof that there was no actual blockade. But the Court held, that it is not necessary, that the whole blockading squadron should lie in one tier; nor is it material that a vessel has escaped the rest; that these ships appeared to have been in the

(*b*) *The Rolla*, 6 Rob. 364.

(*c*) *The Betsey*, 1 Rob. 93.

(*d*) *Per Cur.* *The Mercurius*, 1 Rob. 84.

(*e*) *Ibid.*

(*f*) *The Naples*, 2 Dod. 284.

exterior line ; and that, if there had been only these, it would have been quite sufficient (*g*). So, where a single frigate was employed on a blockade, where it appeared that the admiral on the station considered that ship completely adequate to the service to be performed (*h*). A legal blockade cannot exist, where no actual blockade can be applied. In the very notion of a complete blockade it is included, that the blockading force can apply its power to every part of the blockaded state. If it cannot, it is no blockade in that quarter on which its force cannot be brought to bear ; and where such a partial blockade is undertaken, it must be presumed that this is no more than what was foreseen by the blockading state, which, nevertheless, thought fit to impose it to the extent to which it was practicable. The commerce, though partially open, is still subject to a pressure of difficulties and inconvenience. To cut off the power of immediate export and import from the ports of a country, is, in itself, no insignificant operation, although it may not be possible to exclude the benefit of an inland communication. If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited. On this ground it was held, that a cargo sent from Amsterdam to Embden by an internal canal navigation, with an ulterior destination to London, was not liable to confiscation by reason of the blockade of Amsterdam (*i*). If a blockade be not regularly maintained, but some unprivileged ships are allowed to come out, and others to go in, such a relaxation destroys the legal effect of the blockade. For a blockade is an uniform universal exclusion of all vessels not privileged by law. If such ships are

(*g*) The *Neptunus*, 1 Rob. 170.

(*h*) The *Nancy*, 1 Acton, 63.

(*i*) The *Stert*, 4 Rob. 65 ; The *Julia*, 1 Dod. 169, (*n*) ; The *Ocean*, 3 Rob. 297.

allowed to pass, others will have a right to infer that the blockade is raised (*k*). Thus, where a master entered a port without any attempt made by the ships that were on the station to prevent him from going in, and in other cases no force had been applied for the purpose of enforcing the blockade, and permission was given to go in; it was held, that the purpose of blockade being to prevent access by force, if the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is impossible for a Court of justice to say that there was a blockade actually existing (*l*). So where a blockade was alleged to exist *de facto*, and a vessel, that had sailed out of the port in full view of the squadron, that had before been employed in the blockade, without being stopped, was seized some time afterwards by a privateer, in consequence of a subsequent notification; it was held, that there was no proof of actual blockade (*m*). But a temporary and forced secession of a blockading force, from the accidents of winds and storms, is not sufficient to constitute a legal relaxation of a blockade (*n*). A blockade is to be considered as legally existing, although the winds occasionally blow off the blockading squadron. That is an accidental change, that must take place in every blockade. But the blockade is not thereby suspended; the contrary is laid down in all books of authority, and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and as a mere fraud (*o*); for it is not an accidental absence of the blockading squadron, nor the circumstance of being blown off by the wind, (if the suspension and the reasons of the suspension are known), that will

(*k*) *Per Cur.* The *Rolla*, 6 Rob. 373.

(*l*) The *Juffrow Maria Schroeder*, 3 Rob. 155; The *Vrouw Barbara*, 3 Rob. 158, (*n*).

(*m*) The *Christina Margaretha*, 6 Rob. 61.

(*n*) *Per Cur.* The *Juffrow Maria Schroeder*, 3 Rob. 155.

(*o*) The *Columbia*, 1 Rob. 154.

be sufficient in law to remove a blockade (*p*). When a blockading squadron is driven off by adverse winds, neutrals are bound to presume that it will return, and that there is no discontinuance of the blockade. But where a blockading squadron has been driven off by a superior force, there is no blockade actually existing; and a neutral is not bound, under such circumstances, to presume a continuance of the blockade, nor to act upon the supposition, that the blockade will be resumed by any other competent force. When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade; there is no reason to suppose, that such a circumstance would create a change of system, since it could not be expected, that any blockade could continue many months without being liable to such interruptions. But, when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force; and which introduces therefore a very different train of presumptions, in favour of the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to foresee, or to conjecture, that the blockade will be resumed; and therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, that has been so effectually interrupted. In such case, the former blockade and notification are extinct. The raising of the former blockade by a superior force is a total defeasance of that blockade, and of its operations. There cannot be a more effectual raising of a blockade; and it must be renewed by notification, before foreign nations can be affected with an obligation to observe it as a blockade of that species still existing. The mere appearance of another squadron will not restore it, but the same measures are required for a recommence-

ment, that were required for the original imposition of the blockade (*q*).

There is a distinction, as to the burthen of proof respecting the continuance or termination of a blockade, between a blockade *de facto* and a blockade accompanied with notification. There are two sorts of blockade; one by the simple fact only, the other by notification accompanied by the fact. In the former case, when the fact ceases (otherwise than by accident or the shifting of the wind), there is immediately an end of the blockade. But, when the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, *primâ facie* the blockade must be supposed to exist, till it has been publicly repealed. It is the duty undoubtedly of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it. To suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct, which we are not to suppose any country would pursue. A blockade of this sort may by possibility expire *de facto*; but such a conduct is not hastily to be presumed against any nation, and therefore, until such a case is clearly made out, a blockade by notification is *primâ facie* to be presumed to continue till the notification is revoked. The presumption of continuance being raised by notification, it rests on the other side to prove the contrary (*r*).

These authorities shew the illegality of the Berlin decree; of the British orders in council issued in retaliation, and of the Milan decree, which followed them (*s*). These decrees and orders were an invasion of the right of every neutral state to carry on its own lawful trade with a belligerent. They assumed the power of a single state to vary international rights by its private ordinances; and to impose the penalties

(*q*) The *Hoffnung*, 6 Rob. 112; The *Triheton*, 6 Rob. 65.

(*r*) The *Neptunus*, 1 Rob. 170.

(*s*) 7 Cranch, 433; The *Sansom*, 6 Rob. 413.

of a breach of blockade, where no actual blockade existed. They assumed, in contravention of the clearest principles of public law, a right to create blockades by proclamation. A blockade must be existing in point of fact, and, in order to constitute that existence, there must be a power present to enforce it. All decrees and orders declaring extensive coasts and whole countries in a state of blockade, without an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all refer to a strict and actual siege or blockade. The government of the United States have uniformly insisted, that a blockade should be effective by the presence of a competent force stationed at or near the entrance of the port; and they have protested with great energy against the application of the rights of seizure and confiscation to ineffectual or fictitious blockades (*s*). It has been said, that these orders would have been liable to be described as unjust and repugnant to the law of nations, if they had been merely original and abstract; but that being retaliatory they were not liable to be so described; that France having declared that neutral states should have no access to England, England therefore declared that neutral states should have no access to France; that neutrals were prohibited from trading with France, because they were prohibited by France from trading with England; and that England acquired the right, which it would not otherwise possess, to prohibit that intercourse by virtue of the act of France, and exercised it to its full extent with entire competence of legal authority (*t*). It is difficult to understand how that can properly be called retaliation, which falls not upon the wrong doer, but upon the party injured. The Berlin and Milan decrees were attempts to harass Great Britain indirectly by confiscating neutral property engaged in trade with Great Britain, where by the law of nations it was not

(*s*) Kent Comm. i. 134.

(*t*) The Fox, Edw. 312. 321; The Suipie, Edw. 381.

liable to such a penalty. What is styled retaliation on the part of Great Britain was the confiscation of neutral property engaged in trade with France under similar circumstances. Quod si admittas, says Bynkershoek, admittis quoque, principibus jus fas esse hostibus suis tanquam aquâ et igni interdicere, simulque iis tribuis potestatem vetandi cujuscunque commercii, quod tamen hactenus duntaxat est exercitum in iis, quæ contrabanda dixi obtinuit: sic enim quæcunque ab hostibus comparabunt amici, in commissum cadent, nisi in portum liberum fuerint perducta. Sed ex iis, quæ contra rationem in unâ specie constituuntur, grave est regulam generalem condere, cuique tamen principi inde injuriæ faciendæ præbabitur occasio. Eam utique, nec aliam rationem habet edictum Ludovici XIV.—ad quod edictum ordines generales, ne minus injuriosi viderentur, etiam adversus amicos suos (nam in amicorum caput cuditur hæc faba) in hunc modum edixerunt:—Diceres id edictum jure retorsionis subsistere, sed retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac deinde patitur: non vero adversus communem amicum (*u*). It is monstrous to suppose, says Sir William Scott, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume as much as it thinks fit (*v*).

It was also said, that, although the Prize Court is bound to administer to the subjects of other countries the law of nations as evidenced in the course of its decisions, and collected from the usages of civilized states, yet the king in council possesses a legislative authority over the Court analogous to that which parliament possesses over the Courts of common law (*w*). Such analogy is difficult of comprehension to a constitutional lawyer, who is not aware of any legislative authority subsisting in the king in council, or any authority beyond that of

(*u*) Bynk. Q. J. P. i. iv. p. 199.

(*r*) *Per Cur. Arg.* The Flad Oyen, 1 Rob. 142.

(*w*) The Fox, Edw. 312.

enforcing the laws. Parliament has an absolute authority over common law Courts. It may change the common law at its pleasure; it may abrogate it and substitute any other rule, for the common law Courts are municipal Courts bound by municipal law. But the Prize Court, though sitting here under the authority of the King of Great Britain, is a Court of the law of nations. It belongs to other nations as well as to our own; and, what foreigners have a right to demand from it, is the administration of the law of nations simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence (*x*). The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality (*y*). The Prize Court is a Court determining cases *jure belli*; and *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country (*z*). The commission, under which the Admiralty acts, requires it to proceed according to the course of the Admiralty and the law of nations; and Courts of Prize are governed in all countries by the same law equally known to each (*a*). So far from the king in council being able to alter the unwritten law of the Prize Court, such power is not even possessed by parliament. Neither a British act of parliament, nor any commission founded thereon, can affect any rights or interests of foreigners, unless they are founded on principles, and impose regulations, that are consistent with the law of nations. That is the only law that Great Britain can apply to them; and the generality of any terms employed in any act of Parliament must be narrowed in construction by a religious adherence thereto (*b*). The rules, on which the

(*x*) *The Recovery*, 6 Rob. 340.

(*y*) *The Maria*, 1 Rob. 349.

(*z*) *Le Caux v. Eden*, 2 Doug. 607.

(*a*) *Lindo v. Rodney*, 2 Doug. 613.

(*b*) *Le Louis*, 2 Dod. 238.



Courts of Admiralty profess to proceed, says Lord Kenyon, are the law of nations, and such treaties as particular states have agreed shall be engrafted on that law; and I concur with Lord Mansfield in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations (*c*).

The same character of illegality seems to attach to the interruption of the trade of the neutral port of Hamburgh by the blockade of the Elbe, imposed for the purpose of distressing the enemy in the interior. Sir William Scott contents himself with the remark, that all the general consequences of such a blockade must be supposed to have been considered by the government imposing it; and that, when the measure was once applied, the Court was under the necessity of enforcing it on the only principles, on which any blockade ever has been or ever can be established (*d*). This answer would be conclusive, if the Court of Admiralty were the municipal Court of an absolute sovereign, and bound to obey the orders of his government. Sir William Scott does not explain, how such a measure could be lawfully applied by the government, or lawfully enforced by the Court. It is no answer to say that the blockade was imposed on the enemy in the interior, and that it was only incidentally and by unavoidable consequence that the trade of the neutral neighbourhood was made subject to it. Neutrals must submit to whatever inconvenience arises from the right of a belligerent to blockade the ports of his enemy; but a belligerent has no right to blockade neutral ports. A state has no right to make regulations for its own convenience, which cannot be enforced without trespassing on the rights of others (*e*).

Secondly, of notice. Notice is of two kinds, constructive and actual. Constructive notice is, where notification has been

(*c*) Pollard v. Bell, 8 T. R. 437.

(*d*) The Spes, 5 Rob. 77.

(*e*) Le Louis, 2 Dod. 254.

made to official persons ; in which case a presumption of law arises, that it has been communicated to all persons, to whom it ought to have been communicated in the course of official duty. Thus, where it was said, that no intelligence of a blockade had been received from the consul of the state of Hamburg; the Court held, that it must be presumed, because communication having been made to the consul here, it was his duty to make the communication to the consuls of his government in foreign ports. And as the information had arrived at Hamburg by private channels, the same communication must be presumed to have been made from public authority to the public minister ; and if there had been any neglect, the consequence must be imputed only to the state and its officers, who are answerable to its subjects for the consequences of such neglect (*f*). The effect of a notification to any foreign government is to include all the individuals of that nation. It would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose rights they are bound to protect. A neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent (*g*). It is the duty of a government, having received public notification, to communicate it to their subjects in foreign ports (*h*). But the presumption does not arise, till a reasonable time has elapsed for the purpose of making the communication. Thus, when the notification was made known to the Prussian Consul at Amsterdam, on the 12th of April, it was held to be constructively known to a Prussian subject at Rotterdam, on the

(*f*) The *Spes and Irene*, 5 Rob. 79.

(*g*) The *Neptunus*, 2 Rob. 110.

(*h*) The *Welvaart Van Pillaw*, 2 Rob. 128.

15th (*i*). When notification of the blockade of Amsterdam was given in London on the 11th of June, the Court strongly inclined to hold, that it must have been known in Lisbon on the 10th of July (*k*), and held it to be known in Charleston before October, but not so soon as the 8th of September (*l*). When a ship sailed from Lisbon, at a time when the notification must be taken to have been known, and sailed again from Saffee six months afterwards, it was held, that the blockade must be taken to have been known at Saffee at the time of her sailing (*m*). When a Danish ship had sailed from Rotterdam on the 28th of March, and the blockade had been notified to foreign ministers in London on the 21st, it was held, that a week was not a sufficient time to affect the parties with a legal knowledge of the blockade (*n*).

In the case of conterminous waters, a notification will not reach those parts, which are in the possession of neutrals. Thus, in the case of the blockade of Amsterdam, the Court was inclined to hold generally, that all sea passages to Amsterdam, by that great body of waters, the Zuyder Zee, were blockaded, supposing those passages to be in the possession of the enemy. Such as were in the possession of neutrals, it was of opinion, were not included; unless the blockading force could be applied to the interior extremity of their communication (*o*). Neither, in such case, will a notification of the blockade of the ports of one country, extend even to a hostile port, though itself liable to be blockaded. Thus, the notification of the blockade of the ports of Holland was held not to extend to Antwerp, though the Scheldt was blockaded: and it was urged that the Scheldt was a close

(*i*) The *Calypso*, 2 Rob. 298.

(*k*) The *Neptunus*, 3 Rob. 175.

(*l*) The *Adelaide*, 3 Rob. 285.

(*m*) The *Hartige Hane*, 3 Rob. 329.

(*n*) The *Jonge Petronella*, 2 Rob. 131.

(*o*) The *Twee Gebroeders*, 3 Rob. 336.

river. The Court held, that the Scheldt is not within the Dutch territory, but rather a conterminous river, dividing Holland from the adjacent country. Though by treaties with the Dutch, made in favour of the Dutch, we have considered the Scheldt as shut up, and appropriated to the use of Holland: yet these treaties being extinguished by war with Holland, it would be too much to say, that it is to be regarded as standing upon that footing, particularly for the purpose of a blockade; which is to act upon the interest of other states, who might be no parties to those treaties, even when they did exist. If the government had notified in express terms, that the blockade was to include the Scheldt, which they might certainly have done, (for it was just as lawful to blockade the ports of Flanders as those of Holland), the Court would have enforced the rule so prescribed; but no such signification having been made, it held, that the Scheldt was not necessarily included in the blockade of Holland (*p*).

Actual notice is proved by direct or circumstantial evidence, shewing the knowledge of the party to be affected with it. Thus, where it was argued, that by the American treaty, there must be a previous warning; it was held, that where ships sail without actual knowledge of the blockade, a notice is necessary, but if you can affect them with a knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. When the master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of the blockade, they are not in the situation which the treaty supposes (*q*). So when notice was sent to the governor of the place invested, and he informed all the foreign ship-

(*p*) The *Fran Hsabe*, 4 Rob. 63.

(*q*) The *Columbia*, 1 Rob. 156. Treaty of 1795, Article XVIII. And whereas it frequently happens, that vessels sail for a port or place belonging to the enemy, without knowing that the same is either besieged, blockaded, or invested; it is agreed, that every vessel so circumstanced may be turned away from such port, &c. Martens Tr. vi. 370.

masters, and amongst them the master of the vessel proceeded against, that the port was under blockade, and that they must take notice of it at their peril (*r*). So, when the fact was shewn to be known to the master, warning was held to be unnecessary; and a cargo claimed by the Spanish government was condemned, when it appeared that the fact was known at Madrid in time to give notice of countermand (*s*). A warning on the spot is sufficient, although it be not free from ambiguity, if it appears that the master understood it. Thus, where a vessel destined to Amsterdam was stopped, as she approached the Texel; and the master, being warned that he must not go into the Texel, inquired whether he might go to other Dutch ports; it was held, that the notice was sufficient, when the vessel was seized attempting to reach Amsterdam by the passage of the Zuyder Zee, which was also blockaded (*t*). The notoriety of the fact from time or other circumstances, that must be taken to have brought the existence of a blockade to the knowledge of the parties, is sufficient proof of notice (*u*). Upon this principle, actual warning is unnecessary in the case of a vessel coming out of a blockaded port. It is certainly necessary, that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner by declaration to foreign governments; and this mode would always be most desirable, though it is sometimes omitted in practice. But it may also commence *de facto* by a blockading force giving notice on the spot to those, who come from a distance, and are ignorant of the fact. Vessels going in are in that case entitled to a notice; but it is quite otherwise with vessels coming out of the port, which is the object of blockade: there no notice is necessary after the blockade has existed *de facto* for any

(*r*) *The Rolla*, 6 Rob. 370.

(*s*) *The Jutela*, 6 Rob. 177.

(*t*) *The Mercurius*, 1 Rob. 83.

(*u*) *The Hoffnung*, 6 Rob. 117.

length of time. The continued fact is itself sufficient notice. It is impossible for those within to be ignorant of the forcible suppression of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship (*v*). So when notification of the blockade of the Texel was made on the 11th of June, it was held, that the blockade must have been known at Embden by the latter end of the month, and that such notoriety was sufficient to affect the owner at Embden with knowledge of the fact (*w*). So, where a Bremen ship sailed from Amsterdam on the 24th of April, the blockade of that port having been notified to different governments on the 11th of June in the preceding year, and the ship had sailed from America in September of that year, ignorant of the fact, and it did not appear that any notification had been given to the Hanse Towns: it was held, that although a notification directly affects only the subjects of the state to which it is made, yet, when it has been made to the principal states of Europe; a time must come, when it will affect the rest not so much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. From the moment that a notification is made to a government, it binds the subjects of that state; because it is supposed to circulate through the whole country. But, suppose a notification is made to Sweden and Denmark; it would become the general topic of conversation, and it is scarcely possible, that it should not have travelled to the ears of a Bremen man. And although it might not be so early known to him as to the subjects of the states to which it was immediately addressed, yet in process of time it must reach him, and must be considered to impose the same observance of it upon him. It would strongly affect him with the knowledge of the fact, that the blockade was *de facto* existing. Therefore, although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet in a reason-

(*v*) The *Vrouw Judith*, 1 Rob. 152; The *Adelaide*, 2 Rob. 113, (*n*).

(*w*) The *Neptunus*, 1 Rob. 172.

able time it must affect neighbouring states, as a reasonable ground of evidence (*x*). But such notoriety was not held to affect vessels detained by an embargo in a foreign country, which was likely, under the circumstances of the case, to withhold from them the knowledge of the fact, and which had put a stop to all diplomatic communication with the government of the state to which the vessels belonged (*y*). It is not necessary, that the captor should assign any reason at the time of capture. He takes at his own peril and on his own responsibility in costs and damages for any wrongful exercise of the rights of capture. It may be a matter of convenience, that some declaration should be made; because it is possible that, if the grounds are stated, it may be in the power of the neutral to give such reasons as may explain away the suspicion, which is suggested. But it is not a duty incumbent on the captor to state his reasons, much less is it to be argued negatively, that because no mention was made of the blockade at the time of capture, it must necessarily have been unknown to both the parties (*z*). A notice extending to ports not blockaded is bad altogether. For a blockade is an act of sovereignty, and cannot be extended by a commander of a king's ship. Thus, when a vessel was boarded and warned not to proceed to any Dutch port, it was held, that the notice was illegal; because at the time when it was given, there was no blockade extending to all the Dutch ports. It could not be said, that such a notice, though bad for other ports, was good for Amsterdam. It took from the neutral all power of election, as to what other port he would go to, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress, and the contravention of such a notice would not make him liable

(*x*) *The Adelaide*, 2 Rob. 112.

(*y*) *The Hoffnung*, 6 Rob. 119.

(*z*) *The Jaffrow Maria Schroeder*, 3 Rob. 153.

to condemnation (*a*). But a notice of blockade, which is good as to the port blockaded, will not be vitiated, because it concludes with a requisition to neutral vessels to leave the port, and omits one of the conditions under which vessels might be permitted to go out. Such a requisition is mere surplusage (*b*).

Thirdly, Of the facts which constitute a breach of blockade. When a blockade is known to exist, any act done with intent to enter the blockaded port is a breach of blockade. An innocent person may be penally affected by the acts of his agents, as well as by his own acts; and if he delegates general powers to others, and they misuse their trust, his remedy must be against them (*c*). The master is the agent of the owners of the vessel, and binds them by his misconduct. The act of the master binds the owner with respect to the conduct of the ship, as much as if it were committed by the owner himself. There are powers with which the law invests him, and if he abuses his trust, it is a matter to be settled between him and the person who constituted him master; but his act of violation is, as to penal consequences, to be considered as the act of the owner (*d*). Where the master, having been warned off the Texel, entered the Zuyder Zee, which was blockaded, with intent to go to the blockaded port of Amsterdam, that was held a breach of the blockade (*e*). So, where a ship sailed with an intention of evading a blockade, it was held that such sailing is beginning to execute that intention, and is an overt act constituting the offence. From that moment the blockade is fraudulently evaded. The act of the master will affect the

(*a*) The *Henrick and Maria*, 1 Rob. 148.

(*b*) The *Rolla*, 6 Rob. 370.

(*c*) The *Columbia*, 1 Rob. 154; The *Gute Erwartung*, 6 Rob. 184; The *Adonis*, 5 Rob. 256.

(*d*) The *Vrouw Judith*, 1 Rob. 150.

(*e*) The *Mercurius*, 1 Rob. 80.



owner to the extent of the whole of his property engaged in the transaction. The ship and cargo belonging to the same person must be involved in the same sentence of condemnation. The act of going towards a blockaded port must be taken to be completed by the attempt. If the owners are innocent they must in law be bound by the indiscretion of their agents (*f*). Where a master enters or approaches a blockaded port, such entry or approach is *prima facie* evidence of an intention to violate the blockade. It is no excuse that the master considered himself bound by his charter party to sail to the blockaded port. As in the case of other contracts that become illegal, he might have protested against being any longer bound by it (*g*). Sailing in ballast to a blockaded port is a breach of blockade. In the case of egress the rule is different, but in the case of ingress there is not the same reason for indulgence; and therefore nothing short of a physical necessity has been admitted as an adequate excuse for making the attempt of entry. Generally, where a neutral ship is proceeding to a blockaded port, it must be supposed that she is going there for the purposes of trade. If she goes in ballast, it cannot be with the intention of being laid up for an indefinite time in a foreign port until the blockade is raised. It is a presumption which the Court, acting upon reasonable principles, is bound to entertain and apply, that she has no other errand than to keep alive that commercial intercourse with the interdicted port, which it is the object of the blockade to prevent (*h*). The misinformation of a foreign minister cannot be received as a justification for sailing in actual breach of a blockade. If such information prove false, neutrals must look for redress to their own government, or to those employed under it, who gave such erroneous intelligence. If the information of foreign ministers could be deemed sufficient

(*f*) *The Columbia*, 1 Rob. 154; 1 Kent Comm. (1st ed.) 139, 140.

(*g*) *The Tutela*, 6 Rob. 181.

(*h*) *The Comet*, Edw. 32.

to exempt a party from all penalties, there would be no end to such excuses (*i*). Want of provisions is an excuse, which will not on light grounds be received; because an excuse to be admissible must shew an imperative and overruling compulsion to enter the port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce a master to seek a neighbouring port, but it can hardly ever force a person to resort exclusively to the blockaded port (*k*). Where a master, after having been warned off a blockaded port, declared his intention of going to it, and was found near the same place with his ship's head towards the blockaded port, he was held guilty of a breach of blockade. A master is bound, on the first notice, to take himself out of an equivocal situation; and if he obstinately refuses or neglects to do so, such conduct will amount to a breach of blockade (*l*). So it is no excuse that a ship went into a blockaded port to get a pilot to carry her into a lawful port (*m*). It has been repeatedly determined, that a ship is not at liberty to go up to the mouth of the blockaded port even to make inquiry. That in itself is a consummation of the offence, and amounts to an actual breach of blockade (*n*). If a ship comes into roads, which are so connected with a particular port as almost to form part of it, there is reason to conclude that she comes there with a view to some communication with that particular port. And where a ship was lying within a sand, and within the protection of the batteries in a place where ships of large burden are usually unlivered by lighters, as the more commodious mode of delivering their cargoes, it was held that she must be considered to be within the port; since, for the purpose

(*i*) *The Spes and Irene*, 5 Rob. 79.

(*k*) *The Fortuna*, 5 Rob. 27; *Hartige Hane*, 2 Rob. 124; *The Neutralitet*, 6 Rob. 32.

(*l*) *The Apollo*, 5 Rob. 287.

(*m*) *The Elizabeth*, Edw. 198.

(*n*) *Per Cur.* *The James Cook*, Edw. 263; *The Posten*, 1 Rob. 335, (*n*); *The Arthur*, Edw. 202.

of enforcing a blockade, it is not necessary to restrict the meaning of the word port to the limits of the particular port regulations, which may not extend beyond the pier head. A belligerent is not bound to that restricted sense of the word. If the situation of the vessels is within the protection of the batteries, and in a place which vessels usually frequent for the purpose of unlivery, and from which importation may be safely, and is not unusually, effected, it would not unreasonably be held to be part of the port (o). Where a ship was not in the port, but near it, the Court strongly inclined to hold, that a neutral ship has no right to anchor in such a spot, where she may have the opportunity of slipping into the blockaded port without molestation; that a belligerent is not called upon to admit that neutral ships may innocently place themselves in a situation, where they may with impunity break the blockade when they please; and that it would be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade. If such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel, under pretence of going further, may approach close up to a blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. In this case, however, it was unnecessary to lay down the rule, because the *Trinity Masters* found, that it was not a prudent or natural course for the master to have resorted to such a port as Ostend for the mere purpose of obtaining a pilot to Flushing; and the Court therefore inferred, that the ship had been brought into that

(o) *The Neutralitet*, 6 Rob. 34.

situation with a fraudulent purpose (*p*). So when the master for the professed purpose of taking a pilot on board stood in within a mile of the shore, after he had seen the pilot-boat coming out to him, the Court held, that whatever the equivocal cause of such a situation may be, a person cannot be allowed to approach so near to a blockaded port as to place himself almost within the protection of the shore, and, with no necessity existing, to allow such an approach would render the whole purpose of the blockade perfectly nugatory (*q*). So when the master was steering a course, which would have carried him directly to the blockaded port, with the professed intention of running close under the land to obtain a pilot to take him to a lawful port, that was held to be a fraudulent violation of the blockade. It is impossible that any blockade can be maintained, if the practice is allowed, that a vessel with a destination to a port not interdicted shall be at liberty to pursue her course in such a manner as must draw the cruisers employed on that service under the range of the enemy's batteries (*r*). So, where a master after having spoken an English frigate, from which he might have made inquiry, was found steering directly into the bay of the blockaded port, with the professed purpose of ascertaining the land (*s*). So vessels are not allowed to call for orders at blockaded ports. For, if that were permitted, it would enervate the whole effect of the blockade, because it would be impossible to devise any means by which they could be prevented from delivering their cargoes there (*t*). So where the owners informed the master that the blockade would probably be at an end before he arrived, and directed him to proceed to the mouth of the port; it was held, that the neutral merchant is not to speculate

(*p*) *The Neutralitet*, 6 Rob. 34.

(*q*) *The Charlotte Christina*, 6 Rob. 101.

(*r*) *The Gute Erwartung*, 6 Rob. 182.

(*s*) *The Adonis*, 5 Rob. 256.

(*t*) *The Courier*, Edw. 249.

upon the probability of the termination of the blockade; to send his ships to the very mouth of the port and say, if you do not meet with the blockading force, enter; if you do, ask a warning and proceed elsewhere. The rule is, that after knowledge of an existing blockade, you are not to go to the very station of the blockade under pretence of inquiry. If particular parties are innocent in their intention, it is still a measure of necessary caution and preventive legal policy to hold the rule general against the liberty of inquiring at the very mouth of the blockaded port, which would amount in practice to an universal license to attempt to enter, and on being prevented to claim the liberty of going elsewhere (u). A ship must not go up to the blockading squadron to obtain information of the blockade (v). Nor is it more permissible to go up to a blockading squadron to inquire for a pilot, than to procure information relative to the blockade itself. Of the two it seems less venial, because in that case the fact of an actual knowledge of the blockade is admitted; in the latter, there is at least the possibility of ignorance. Such an excuse could not be admitted without a total abandonment of belligerent rights (w). The subjects of America are bound equally with those of other countries to all the general rules of observance of a blockade duly imposed. At the same time looking to the great distance at which they are placed, the Court has held, even where the blockade of a port in Europe has been notified in America, that the merchants of that country might still clear out conditionally for the blockaded port on the supposition, that before the arrival of the vessel a relaxation might have taken place. It was held, that ships sailing from America, before the knowledge of blockade had reached America, should be entitled to a notice even at the blockaded port; and that ships sailing afterwards, might sail

(u) *The Spes and Irene*, 5 Rob. 76.

(v) *The Posten*, 1 Rob. 335, (s), compared with the *Betsey*, *ibid*.

(w) *The Arthur*, Edw. 206.

on a contingent destination even to that port, with the purpose of calling at some British port for information, and that they should be allowed the benefit of such contingent destination, to be ascertained and rendered definite by the information which they should receive in Europe. But as to the line of caution to be observed in this state of uncertainty, the Court has always expected, that the inquiry should be made at some British ports in the Channel. It could not be, that ships should be permitted to resort to the ports of the blockaded country for this information; since every one must perceive, that such a liberty would place it in the power of the enemy to determine the continuance of the blockade. In no case has it been held, that they might sail to the mouth of the blockaded ports to inquire, whether a blockade, of which they had received previous formal notice, was still in existence or not. The ports of the blockading country are certainly the proper ports for inquiry; and it would not be too much to expect, that this precaution should be noted in the papers, and that it should be most explicitly enjoined on the master and supercargo in their instructions to obtain the information, that may be necessary to fix the destination, at some of the British ports in the Channel (*x*). When a ship's papers hold out a destination, which is inconsistent with her course, the legal conclusion is, that the port of her destination is dissembled, because it is one that could not safely be disclosed (*y*).

The act of egress is as culpable as the act of ingress, and a blockade is just as much violated by a ship passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation

(*x*) *The Shepherdess*, 5 Rob. 152; *The Spes and Irene*, 5 Rob. 76.

(*y*) *The Mentor*, Edw. 207.

than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken in a cargo before the blockade begins, she may be at liberty to retire with it. If she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade (*z*). When a master voluntarily entered a blockaded port, and was there compelled to sell his cargo, and took another cargo on board; it was held, that the entry and taking a cargo were both violations of the blockade (*a*). A license, expressed in general terms, to sail from any port with a cargo, will not authorize a ship to sail from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the license; otherwise, a blockaded port shall be taken as an exception to the general description in the license (*b*). In a blockaded port, a traffic cannot be allowed in ships more than in goods; and, consequently, when a ship of an enemy is so purchased by a neutral, the transfer is illegal (*c*). Where a ship, that had been the property of the enemy at the commencement of the war, was taken coming out of a blockaded port, and satisfactory proof could not be given, that she had been transferred before the commencement of the blockade, the ship was condemned (*d*). If an enemy's ship is purchased in a blockaded port, that alone is the illegal act; and it is immaterial out of what funds the purchase was effected (*e*). But the purchase of a ship in a blockaded port by one neutral from another, is lawful, and stands clear of all objection on the ground of blockade (*f*). It is lawful for a

(*z*) *The Vrouw Judith*, 1 Rob. 150; *The Frederick, Molke*, 1 Rob. 86; *The Mercurius*, 1 Rob. 170.

(*a*) *The Byfield*, Edw. 188.

(*b*) *The Byfield*, Edw. 190.

(*c*) *The Speculation*, Edw. 346.

(*d*) *The Vigilantia*, 6 Rob. 122.

(*e*) *The Vigilantia*, 1 Rob. 62.

(*f*) *The Potsdam*, 4 Rob. 89.

neutral ship to withdraw from a blockaded port in ballast, or with a cargo that she took in, or with a cargo shipped *bond fide* before notice of the blockade (*g*). The same rule applies with equal justice to goods sent in before the blockade, and withdrawn *bond fide* by the neutral proprietor (*h*). But, where a ship came out of a blockaded port in ballast, and was afterwards taken with a cargo on board, that had been sent out of the same port in lighters, under charter-party with the ship, the ship and cargo were condemned (*i*). A license to import a cargo from a port, granted on the same day when the notification stated the blockade to commence, was held to be a protection (*k*). A license to go to the blockaded ports of the Vlie was held to include Amsterdam, which is one of those ports. And when a license is granted to go to a port by one passage, it is not substantially violated by going through another passage, unless some special prohibition, or some special inconvenience is shewn, which the party was bound to take notice of. Though a license be a *privilegium*, yet licenses in case of blockade are to be favourably regarded, for it imports the good faith and honour of governments, who grant them not to press the letter too rigourously in such a case (*l*). A license to enter a blockaded port necessarily implies a license to come out again; and, when a return cargo was innocently taken on board, it was held to be protected, no proviso having been inserted, that the party licensed should not bring a cargo away (*m*). Where a master sailed to a blockaded port, and meeting a British fleet, was informed, that the port was not blockaded, although he would have been

(*g*) The *Juno*, 2 Rob. 119; The *Nossa Lenhora*, 5 Rob. 52; The *Vrouw Judith*, 1 Rob. 152; The *Potsdam*, 4 Rob. 89.

(*h*) The *Juffrow Maria Schroeder*, 4 Rob. 89, (*n*).

(*i*) The *Charlotte Sophia*, 6 Rob. 214, (*n*); The *Maria*, 6 Rob. 201; The *Lisette*, 6 Rob. 394.

(*k*) The *Hoffnung*, 2 Rob. 163.

(*l*) The *Juno*, 2 Rob. 116.

(*m*) *Ibid*.



taken in delicto, if he had been captured before he met the fleet, the Court refused to look retrospectively to the state he was in before he met the fleet; and held, that the erroneous information afforded a reasonable ground of belief that the blockade was raised, as it could not be supposed, that such a fleet would be ignorant of the fact. The ship and cargo were restored (*n*). But misinformation in matter of law is no excuse (*o*). Where a ship sails on a destination to a blockaded port, the law allows a locus poenitentiae; and if the intention be abandoned, and the ship be taken while proceeding to some open port, the claimants are entitled to the benefit of the fact (*p*). A ship is justified, by unavoidable necessity, in going into a blockaded port. Thus, where a ship came out of a blockaded port with the same cargo she had gone in with in distress, and the *Trinity Masters* found, that the deviation was necessary, and that the state of the wind, and other circumstances, made other ports objectionable; that was held a sufficient justification (*q*). So, where a ship was driven into the blockaded port by a strong westerly wind, that had been blowing continually for nine days (*r*).

Fourthly. Of the penalty. A breach of blockade subjects the property of those concerned in it to confiscation. The penalty attaches to all, who are privy to the fraud, by themselves or their agents (*s*). Where an attempt to violate a blockade was ordered by the consignees, who were agents for the ship and cargo; both were condemned, though the ship sailed with innocent intentions on the part of the American owners. If a person delegates general powers to others, and

(*n*) *The Neptunus*, 2 Rob. 110.

(*o*) *The Courier*, Edw. 249.

(*p*) *The Neptunus*, 2 Rob. 110; *Per Cur.* *The James Cook*, Edw. 263.

(*q*) *The Charlotta*, Edw. 252.

(*r*) *The Fortuna*, 5 Rob. 297.

(*s*) *The Wasser Hundt*, 1 Dod. 27.

they misuse their trust, his remedy is against them (*t*). The act of the master binds the owner as to the conduct of the ship. His act of violation is, as to penal consequences, to be considered as the act of the owner (*u*). The intoxication of the master is no excuse. If such an excuse could be admitted, there would be eternal carousings in every instance of a violation of blockade. The master cannot, on any principle of law, be allowed to stultify himself in this manner, by the pretended or even real use of strong liquors, of which, if it were a thing to be examined, the Court could, in no instance, ascertain the truth of the fact. The owners of the vessel have appointed him their agent, and they must, in law, be bound by his imprudence, as well as by his fraud (*v*). The master is not the representative of the owner of the cargo to the same extent, and in the same direct manner, that he is the representative of the owner of the ship. On that account, in some cases, where the facts have shewn that the intention of the owner was pure, the Court has given the claimant the benefit of this distinction: for instance, where the voyage began before the knowledge of the blockade, and where a master, on being warned, has appeared to have been actuated only by a personal obstinacy and perverseness in pursuing his course to his original destination. That is a case in which the intention of the owner is admitted to be pure; where nothing stands against it in limine; where there is no question of fact whether he was consentient to the fraud; where, if he was affected at all, it would only be by strict legal principle, that affects the principal by the conduct of his agent (*w*). Where a ship was condemned for sailing with intent to violate a blockade, the cargo was restored, where it appeared to have been ordered

(*t*) *The Columbia*, 1 Rob. 154.

(*u*) *The Vrouw Judith*, 1 Rob. 150.

(*v*) *The Shepherdess*, 5 Rob. 226.

(*w*) *The Adonis*, 5 Rob. 261; *The Exchange*, Edw. 43.

without notice of the blockade, and without reasonable time to countermand after notice (*x*). A more liberal time for countermand is to be allowed to American merchants, not merely on a calculation of distance, but with reference to the accidents by which the general intercourse, even after the allowance for distance, is liable to be retarded (*y*). In cases of supervening illegality, where it has been shewn by proofs not supplied afterwards, but found on board at the time of the capture, that the owner of the cargo stood clear of any possible intention of fraud; the Court has held the owner not responsible for the act of the enemy shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal (*z*). The master is the agent for the owner of the vessel, and can bind him by his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them (*a*). But neutrals are not to be allowed to attempt to trade to blockaded ports with impunity, by throwing the blame upon the carrier master. If such an artifice could be proved, it would establish that *mens rea* in the neutral merchant, which would expose his property to confiscation; and it would at the same time be sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship (*b*). Where the blockade is known at the port of shipment the master becomes an agent for the cargo; in such case the owners must, at all events, answer to the country imposing the blockade for the acts of persons employed by them; otherwise by sacrificing the ship there would be a ready escape for the cargo, for the benefit of which the fraud was intended (*c*). Where the

(*x*) *The Neptunus*, 3 Rob. 173; *The Adelaide*, 3 Rob. 281.

(*y*) *The Adelaide*, 3 Rob. 281.

(*z*) *Per Cur.* *The Exchange*, Edw. 43.

(*a*) *The Mercurius*, 1 Rob. 84; *The Imina*, 3 Rob. 170.

(*b*) *The Mercurius*, 1 Rob. 85.

(*c*) *The James Cook*, Edw. 261; *The Arthur*, Edw. 202; *The Exchange*, Edw. 40; 1 Kent Comm. (1st ed.) 141.

blockade is known to the owner of the cargo, the shipper is his agent. If this rule were not adopted, there would be no end of shipments made during a blockade; while there would be nobody at all answerable for such acts of misconduct (*d*). If the cargo was going to a blockaded port, in consequence of a breach of faith in the agents or the master, the merchant must indemnify himself by recourse against the wrongdoer (*e*). So, where the master is consignee of the cargo (*f*). So, where there was a supercargo on board, and after due warning the master, in a continued state of intoxication, refused to alter his course, and the supercargo took no step to compel him to do so, but suffered the vessel to proceed on the interdicted course, and relied only on a secret intention in his mind to dispossess the master before he actually got into port. It would be a dangerous doctrine to hold, that a master, in a state of intoxication, might be permitted to go on for the blockading port, and that the supercargo might lie by, and then come and plead the intoxication of the master, and exculpate himself by stating a mere intention to dispossess him, and to steer another course (*g*).

A fraudulent deviation towards a blockaded port, accompanied with false excuses, such as wanting a pilot, or water, or provisions, or to ascertain the land, is conclusive against the owner of the cargo. When such excuses are false, a presumption necessarily arises, that it was for the delivery of the cargo that such a fraud had been attempted; since there is scarcely any other adequate motive which can be supposed to induce a master to hazard the interests of his vessel, the motives that he has assigned being demonstrated to be false. There is a presumption likewise in such cases, that it is done with

(*d*) *The Juffrow Maria Schroeder*, 3 Rob. 158; *The Hurtige Hane*, 3 Rob. 325; *The Tutela*, 6 Rob. 177.

(*e*) *The Exchange*, Edw. 40.

(*f*) *The Elizabeth*, Edw. 198.

(*g*) *The Shepherdess*, 5 Rob. 266.

the knowledge and at the instigation of the owner of the cargo; because, although it is not an impossible thing that a master may be guilty of barratry, it is not a natural conduct, nor what is gratuitously to be supposed. The effect of the presumption is not merely to operate as matter of evidence in concurrence with other proofs, but to exclude all contrary averment. Although it is possible that a master should commit barratry in a case of this kind, yet the owner cannot be permitted to go into proof upon this point, on account of the fraudulent abuse to which such a liberty must inevitably lead; since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. The ordinary test would be letters to correspondents elsewhere, and insurances; measures wholly in the power of the parties, and capable of being made, at their pleasure, a complete recipe for a safe traffic with a blockaded place. When this consequence is duly weighed on one side, and when it is considered on the other what few inducements a master can have to go to any other port than that at which his charter-party binds him to deliver his cargo, and particularly to a blockaded port, less injustice will be done by adopting this rule, than by permitting the freighter to distinguish, by external and collateral evidence, the destination of his cargo from that of the master (*h*). Where a ship is going into a blockaded port on a frivolous pretence, it would be impossible to maintain a blockade, which is directed more against the cargo than against the ship, if the Court did not draw the inference that a ship going on fraudulently is going in the service of the cargo, with the knowledge and by the direction of the owner. If any inconvenience arises to the claimants of the cargo from this necessary conclusion, the owners of the vessel, or the master, are the persons to whom they must look for indemnification (*i*). It is a clear and inflexible principle,

(*h*) The *Adonis*, 5 Rob. 256.

(*i*) The *Alexander*, 4 Rob. 93; 1 Kent Comm. (1st ed.) 141.

that the port of destination, being an interdicted port, is the port of delivery of the cargo. If it were once admitted that a ship may enter an interdicted port to supply herself with water, or any other pretence, a door would be open to all sorts of frauds, without the possibility of preventing them (*k*). But where there was a contingent destination to a blockaded port, with an honest intention of coming to the belligerent country to procure a license, it was held that there was no ground to impute fraud (*l*).

The penalty attaches till the voyage is complete. A ship that has violated a blockade is liable to be seized on its return voyage. There can be no natural termination of the offence but the end of that voyage. It would be ridiculous to say, that if you can get past the blockading force, you are free. There is no other point at which the offence can be terminated, but the end of the return voyage. If a ship, that has broken a blockade, is taken in any part of that voyage, she is taken in delicto, and subject to confiscation (*m*). Where a vessel slips into an interdicted port, it is not till she comes out again that any opportunity is afforded of vindicating the law. It has been objected, that if the penalty is applied to the subsequent voyage, it may travel on with the vessel for ever. In principle, perhaps, it might not unjustly be pursued farther than the immediate voyage, but in practice it has not been carried farther than the voyage succeeding, which affords the first opportunity of enforcing the law (*n*). Where a vessel was driven into a port by stress of weather, it was held, that the voyage was not terminated; that it was impossible to consider this accident as any discontinuance of the

(*k*) *The Exchange*, Edw. 42.

(*l*) *The Mercurius*, Edw. 53.

(*m*) *The Frederick Molke*, 1 Rob. 86; *The Welvaart Van Pillaw*, 2 Rob. 128; *The Adelaide*, 2 Rob. 111, (*n*); *The General Hamilton*, 6 Rob. 61; *Bynk. Q. J. P. i.* xi.

(*n*) *The Christiansberg*, 6 Rob. 382; *Parkman v. Allan*, 1 *Stair's Decisions*, 529.

voyage, or as a defeasance of the penalty which had been incurred (*o*).

The penalty does not attach where there is no *corpus delicti*. Though there is *mens rea*, the parties are allowed the benefit of extrinsic circumstances turning out in their favour. Thus, where there was a design to violate a blockade, but before the vessel sailed the blockade was raised; it was held, that there was not that *corpus delicti* existing that would be necessary to draw upon them the penalties of the law (*p*). So, where the blockade is raised before the capture, a ship cannot be condemned for the breach of a bygone blockade. The same reason for rigour does not exist, because the blockade being gone, the necessity for applying the penalty to prevent future transgression does not continue. It is true, that the offence incurred by a breach of blockade generally remains during the voyage; but that must be understood as subject to the condition, that the blockade itself continues. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken in *delicto*. The *delictum* may have been completed at one period, but it is by subsequent events entirely done away (*q*).

(*o*) The General Hamilton, 6 Rob. 61; Bynk. Q. J. P. i. xii. p. 214.

(*p*) The Conferenzrath, 6 Rob. 362.

(*q*) The Lisette, 6 Rob. 387.

## CHAPTER V.

## OF CONTRABAND.

THE subject of contraband is to be considered with respect to the questions, First, What goods are contraband? Secondly, To whom and to what extent the penalty attaches? Thirdly, With respect to the conveyance of enemy's despatches? and Fourthly, The penalty thereof.

First, Grotius divides all articles of commerce into three classes, First, Those which are used only for purposes of war. Secondly, Those which have no military use, and are merely matters of luxury. Thirdly, Such as are of promiscuous use, being adapted either to military or to civil purposes. With respect to the first, he holds, that those who supply the enemy with the means of war must be considered as his adherents, so that articles of the first class are always contraband. Those of the second class are always innocent. Those of the third class he holds to be innocent or contraband, according to their destination and the circumstances of the war. In respect to the third class, he appears not to distinguish the doctrine of contraband from that of blockade (*a*), and in his time no settled rules were established by the usage of nations in relation to this matter (*b*).

With regard to the division itself, Bynkershoek has remarked, that it is not logically accurate, since there is nothing which belongs strictly to its first class. There is nothing

(*a*) Grot. iii. i. v.

(*b*) Grot. *ibid.* § 5.



so exclusively military, that it cannot be applied to civil uses. Swords may be worn as a part of civil dress, and gunpowder may be applied to purposes of sport, amusement, or public rejoicing, yet no one doubts that both are contraband. The matter therefore must be determined by reference to such distinctions as the usage of nations has established (*c*). Goods going to a neutral port cannot come under the description of contraband, inasmuch as all goods with a neutral destination are equally lawful (*d*). So it was held, that a cargo could not come under the description of contraband, which was innocently shipped on board a vessel, which sailed in bonâ fide ignorance of war (*e*). Nor can any question of contraband arise as to goods sold by neutrals in their own country and not conveyed in neutral vessels. A neutral may lawfully sell in his own country to a belligerent arms, ammunition, and other articles, which would be contraband on board a neutral vessel destined to a hostile port (*f*). But a person is not at liberty to carry to a hostile port a cargo containing, amongst other things, contraband articles with the intention of selling innocent commodities only, and of proceeding with the contraband articles to a neutral port (*g*). The transfer of contraband articles from one port of a country to another, where they are required for the purposes of war, is subject to be treated in the same manner as an original importation into the country itself (*h*).

Gunpowder, arms, and military equipments, and other things peculiarly adapted to military purposes, have been always contraband (*i*), though, with respect to some of them, the right of pre-emption has been substituted in modern

(*c*) Bynk. Q. J. P. i. x.

(*d*) *The Imina*, 3 Rob. 167; Val. Tr. v. 6, ix.

(*e*) *Jurgan v. Logan*, 1 Stair's Decisions, 477.

(*f*) Bynk. Q. J. P. i. xxii; Kent Comm. i. 132.

(*g*) *The Trende Sostre*, 6 Rob. 390, (*n*).

(*h*) *The Edward*, 4 Rob. 68.

(*i*) Bynk. Q. J. P. i. x.

practice for that of confiscation, where they are the produce of the country exporting them. Thus sail cloth is universally contraband, even on a destination to ports of mere mercantile equipment (*k*). So of masts (*l*), anchors (*m*), pitch, and tar (*n*), and hemp (*o*). But pitch and tar *bonâ fide* intended for the ship's use as stores are not contraband. The *bonâ fides* is a question of evidence, whether the quantity found on board could really be intended for the ship's use. Persons are not, under pretence of a voyage round the world, to carry as much as they please of articles of this noxious nature and then sell them at different ports, where they may immediately become convertible to purposes of war. The term stores is to be liberally interpreted, but still it must be so understood as to be capable of something like a definitive construction (*p*). A ship peculiarly adapted to purposes of war is contraband as an article of commerce, if intended to be sold for hostile purposes. It cannot, under any point of view, but be considered as a very hostile act to be carrying a supply of a very powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use (*q*). Thus, where a vessel in every respect fitted for a ship of war was sent on her first voyage to a belligerent port, with instructions to the master to sell her or take goods on freight, but that the owners would prefer selling to freighting, as she was not adapted to purposes of freight, the ship was condemned (*r*). But where ships of ambiguous use, and previously employed for purposes of trade,

(*k*) *The Neptunus*, 3 Rob. 108.

(*l*) *Itaadt Embden*, 1 Rob. 29; *The Charlotte*, 5 Rob. 305.

(*m*) *Per Cur.* *The Jonge Margaretha*, 1 Rob. 189.

(*n*) *The Jonge Jobias*, 1 Rob. 329; *The Neutralitet*, 3 Rob. 295; *The Twee Juffrowen*, 4 Rob. 242; *The Sarah Christina*, 1 Rob. 237.

(*o*) *The Evert*, 4 Rob. 354; *The Apollo*, 4 Rob. 158; *The Richmond*, 5 Rob. 325.

(*p*) *The Richmond*, 5 Rob. 334.

(*q*) *The Richmond*, 5 Rob. 325.

(*r*) *The Brutus*, 5 Rob. App. 1.

were sold under circumstances not indicating a hostile purpose, they were restored (*s*).

In respect of matters of ambiguous use, the catalogue of contraband has varied much, and sometimes in such a manner, as to make it very difficult to assign the reasons of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir Robert Wiseman, then king's advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil, were liable to be deemed contraband. "I do agree," says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, "that corn, wine, and oil will be deemed contraband." These articles of provision then, were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of the Admiralty Court. In much later times, many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter going to Rochelle, was condemned; cheese was more favourably considered. The distinction appears nice; in all probability, the cheeses were not of that species, which is intended for ships' use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances shew, that articles of human food have been so considered, at least, when it was probable that they were intended for naval or military use. Favourable positions have been laid down upon this matter by Wolfius and Vattel, and other writers of the continent, although Vattel expressly admits, that provisions may, under circum-

(\*) *The Fanny*, &c. *ibid*.

stances, be treated as contraband. The modern established rule is, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the circumstances that tend to preserve provisions from being treated as contraband, one is, that they are the growth of the country which exports them. Another circumstance to which some indulgence is shewn by the practice of nations, is, when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile use, or whether they were going, with a highly probable destination, to military uses; of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles are going, is not an irrational test. If the port is a general commercial port, it shall be understood that the articles are going for civil use, although occasionally a frigate, or other ships of war, may be constructed in that port. On the contrary, if the great predominant character of the port be a port of military equipment; it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule, which deduces both ways the final use from the immediate destination: and the presumption of a hostile use founded upon its destination to a military port is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously

preparing, to which a supply of those articles would be eminently useful (*t*). Cheeses not fit for naval use, but mere luxuries for the use of domestic tables, are not confiscable, though sent to a port of military equipment (*u*). So of torse, an inferior kind of hemp, unfit for naval purposes. But the captor's expenses were allowed, because torse is so like hemp, that if it were allowed to pass without examination, the enemy would be supplied with hemp (*v*). But, Dutch cheeses, sent by a neutral merchant from Amsterdam to Brest, being cheeses fit for naval use, and such as are exclusively used in French ships of war, were condemned (*w*). So, when cheeses fit for naval use, were sent to Corunna, they were deemed contraband; because Corunna, if not in its prominent character, a port of naval equipment, is situated in the same bay with Ferrol: and if the supply were permitted to be imported into the bay, it would be impossible to prevent its going on immediately, and in the same conveyance to Ferrol (*x*). But such cheeses, destined to Quimper, were held not to be contraband. That port, though in the vicinity of Brest, being situated on the opposite side of a projecting headland, or promontory, so as not to admit of an immediate communication, except by land carriage (*y*). So, such cheeses sent to Bourdeaux, not being a port of naval military equipment in its principal occupation, although smaller vessels of war may be occasionally built and fitted out there, were restored (*z*). So rosin, going to a port not of military equipment, was held not contraband (*a*). So tallow, going to Amsterdam, a great mercantile port, as well as a port of military equipment, was

(*t*) The Jonge Margaretha, 1 Rob. 189.

(*u*) The Jonge Margaretha, 1 Rob. 195.

(*v*) The Gesellschaft, 4 Rob. 94; The Evert, 4 Rob. 354.

(*w*) The Jonge Margaretha, 1 Rob. 189.

(*x*) The Zelden Rust, 6 Rob. 93.

(*y*) The Frau Margaretha, 6 Rob. 92.

(*z*) The Welvaart, 1 Rob. 195, (*n*).

(*a*) The Nostra Signora, 5 Rob. 97.

held not to be contraband (*b*). A cargo of ship biscuits, on a voyage to Cadiz, a port of naval equipment, were condemned (*c*). So wines, though not generally contraband, *per se*, were held to be naval stores, when taken on a voyage to Brest, where there was a large armament lying very much in want of articles of this kind, articles of an indispensable nature (*d*). A cargo of ship timber, going to an enemy's port of naval equipment, is contraband (*e*).

Secondly, Of the penalty. The modern rule of the law of nations is, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern times however has introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions. Where the ship belongs to the owner of the cargo, or is going on such service under a false destination, or with false papers, or the owner is privy to the offence, those circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one (*f*). According to the ancient practice a contraband cargo carried with it the condemnation of the ship, but in later times this practice has been relaxed; and an alteration has been introduced, which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies to the case, where the owners of the ship

(*b*) The *Neptunus*, 3 Rob. 108.

(*c*) The *Ranger*, 6 Rob. 125.

(*d*) The *Edward*, 4 Rob. 68.

(*e*) The *Endraught*, 1 Rob. 25.

(*f*) The *Neutralitet*, 3 Rob. 295.

and cargo are different persons. Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation. Where there are more owners of the ship than one, and they are only part owners, and not general partners with the owner of the cargo, they are not necessarily affected by his criminal acts (*g*). To escape the contagion of contraband the innocent articles must be the property of a different owner (*h*). The general rule is, that the ship herself, and the innocent parts of the cargo also, belonging to the owner of the contraband, will be subject to condemnation on the known principle, that the infection of contraband extends to all interests included in the same claim on behalf of the same proprietor. But where the government had permitted a trade in innocent articles, specifying such as were considered not innocent, and had directed all other goods to be restored; it was held, that this direction implied that the general principle of contraband contagion was not to be applied to goods or ships, which were the objects of the order (*i*).

Anciently the carrying of contraband did, in ordinary cases, affect the ship; and although a relaxation has taken place, it is a relaxation that can only be claimed in fair cases. The aggravation of fraud justifies additional penalties, and the right of pre-emption must be secured by them. It is a settled rule of law, that the carriage of contraband with a false destination, will work the condemnation of the ship as well as the cargo. Thus, where a Prussian ship was captured with a cargo of

(*g*) The *Jonge Jobias*, 1 Rob. 329; The *Ringende Jacob*, 1 Rob. 89; The *Sarah Christina*, 1 Rob. 238; The *Floreat Commecium*, 3 Rob. 178.

(*h*) The *Staadts Emblem*, 1 Rob. 26.

(*i*) The *Neptunus*, 6 Rob. 403.

hemp and iron destined ostensibly to Lisbon, but really to Bilboa, the ship and cargo were condemned (*k*). So where a ship with a cargo of hemp was going to Bilboa with a false destination to Lisbon (*l*). So where a neutral vessel was captured with a cargo of wines destined ostensibly to Lisbon, but really to Brest (*m*). The penalty does not generally attach, unless the articles are taken in delicto in the actual prosecution of a voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port, indeed, on a hostile destination, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken in delicto and in the actual prosecution of such a voyage, the penalty is not now generally held to attach. Thus, where the destination of a ship, which had sailed with a contraband cargo to a hostile port, had been changed, and the ship at the time of capture was sailing to a neutral port; it was held, that there was no *corpus delicti* existing at the time of capture, and that the property was not liable to confiscation (*n*). So where a ship sailed with contraband articles to a hostile port, which had surrendered before the ship was captured; it was held, that this circumstance completely discharged the whole guilt. There was no *delictum* existing at the time of the seizure to sustain the penalty. The character of the goods was altered, and they were no longer to be considered as going to the port of an enemy. It is not enough to say, that they were going with an illegal intention. There may be the *mens rea* not accompanied with the act of going to an enemy's port. The same rule applies to cases of

(*k*) *The Franklin*, 3 Rob. 217.

(*l*) *The Floreat Commmercium*, 3 Rob. 178.

(*m*) *The Edward*, 4 Rob. 68.

(*n*) *The Imina*, 3 Rob. 167.



contraband, and on the same principle, that is applied in cases of blockade (*o*).

But the penalty attaches to goods not in delicto, where they are the proceeds of contraband carried outwards with false papers, on the principle that the party shall not be allowed to take advantage of his own wrong. In that class of cases it is held, that the right of capture having been defrauded in the original voyage, the opportunity shall be extended to the return voyage (*p*).

The general rule is, that the carriage of contraband works a forfeiture of freight and expenses. But this rule was not enforced, where the contraband articles were in a small quantity, amongst a variety of others (*q*).

In relaxation of the strict principle that contraband is confiscable, the rule that now prevails—as to pitch, tar, hemp, timber, and other native products,—is, that being the produce and property of the exporting country, and conveyed in its vessels, they are not liable to confiscation, but subject to pre-emption only (*r*). The same relaxation is applied to cargoes of provisions avowedly destined to enemy's ports, or suspected on just grounds to have a concealed destination of that kind. The right of taking possession of cargoes of this sort belongs generally to belligerent nations. The ancient practice of Europe, at least of several maritime states of Europe, was to confiscate them entirely: a century has not elapsed since this claim was asserted by some of them (*s*). The condition of such cargoes being the produce of the exporting country is liberally construed. Thus, a cargo of timber from Dantzic, which could hardly be and was not proved to be in strictness

(*o*) *The Trende Sostre*, 6 Rob. 390, (*a*).

(*p*) *Per Cur.* *ibid.*

(*q*) *The Neptunus*, 3 Rob. 108.

(*r*) *The Apollo*, 4 Rob. 158; *The Twee Juffrowen*, 4 Rob. 242; *The Christina Maria*, 4 Rob. 166.

(*s*) *The Haabet*, 2 Rob. 182.

the produce of the territory of Dantzic but of the neighbouring territory of Poland, was restored. The Court of Appeal held, that Dantzic, though a free city, being within the immediate protection of Poland, was entitled to export such a commodity as one of its own products (*t*). But such a construction is not to be made to the prejudice of a dependent state. It was held by the Lords of Session, that a sovereign prince holding of the enemy and receiving investiture from him is not an enemy, by reason of such superiority and investiture only (*u*). In the case of Lubeck and the Hanse Towns it was held, that the rule was not to be restrained to the produce of their own territory, but would extend to commodities the growth of those neighbouring districts, whose produce they are usually employed in exporting in the ordinary course of their trade (*v*). The relaxation respecting the produce of the exporting country has been further extended to importation in neutral ships. In the case of the *Jonge Pieter* hemp being Prussian property was sent to Bordeaux in a Dutch ship. It was argued, that according to the old rule contraband affected the ship as well as the cargo; that the relaxation which had taken place was introduced in favour of the ship, and as a concession in favour of the navigation of neutral countries, when employed in the exportation of their own produce or manufactures; that cases, which did not fall within the reach of this principle, were still subject to the old law. On the part of the claimants it was contended, that the relaxation was not so restricted: that by the modern rule neutral merchants are at liberty to export the produce of their own country on their own accounts; that this being allowed, there was no reason, why it should not be permitted in other neutral ships as well as in those of their own country, it being equally in the course of their ordinary commerce. The Court of Appeal were of that opinion; and

(*t*) The *Juffrow Wobetha*, cited 4 Rob. 163.

(*u*) *Ludquharn v. Seaton*, 1 Stair's Decisions, 418. 425.

(*v*) *Per Cur.* The *Evert*, 4 Rob. 354.

upon the authority of that case, hemp, the produce of Russia and the property of a Russian merchant, exported in a Prussian ship to Amsterdam was restored (*w*). But the produce exported must be the property of a merchant of the exporting country. Thus Bologna hemp exported on account of a merchant of Genoa was condemned (*x*). It is incumbent on the claimants to prove the circumstances which entitle the cargo to exemption (*y*). But where the produce forms the great staple of the exporting country, the presumption that it is the produce of the exporting country may be allowed in favour of the claimant without absolute proof (*z*). The exemption is forfeited by fraud. Thus a cargo of pitch and tar going to a French port under a pretended neutral destination was condemned. If pitch and tar are going avowedly to the enemy, they may be brought in for pre-emption; but if papers holding out a neutral destination are put on board, this right is eluded, and the enemy is securely and commodiously provided with the instruments of war. The cruiser can only satisfy himself of the destination; he cannot detain without a responsibility in damages. The false representation therefore is not useless for the purposes of mischief: it is the passport and convoy for noxious articles to the ports of the enemy (*a*).

Where the right of pre-emption is exercised with respect to a cargo going to an enemy's port, the owner is entitled to a reasonable indemnification, and to a fair profit upon it; reference being had to the original price paid by the exporter, and the expenses which he has incurred. The price which he would have obtained from the enemy, if the cargo had reached the enemy's port, is not the measure of indemnification and profit. The enemy may be distressed, and may be driven by

(*w*) The Apollo, 4 Rob. 158.

(*x*) The Santissimo Sacramento, cited 1 Rob. 163.

(*y*) The Evert, 4 Rob. 355.

(*z*) The Twee Juffrowen, 4 Rob. 242.

(*a*) The Sarah Christina, 1 Rob. 237.

his necessities to pay a famine price for the commodity, if it got there; but it does not follow, that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. Much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but lawful exercises of the rights of war. Nor is insurance due where it has not been paid; although it is reasonably to be charged at the port of delivery, because the merchant has stood his own risk, and has purchased the insurance at the expense of his own danger. The voyage having been intercepted, the utmost that can be claimed is an insurance *pro ratâ itineris peracti* (b).

The law of contraband has in many cases been ascertained, or varied by treaty. With respect to the exceptions contained in treaties, it is to be observed that an inference is not to be drawn from them; that things so excepted are to be considered as contraband, where no exception is expressed. Enumeration takes place to prevent misunderstanding; it distinguishes what shall be contraband from what shall not: but the exception of particular articles is not to be understood in the strict sense in which it is sometimes said, *exceptio confirmat legem* (c).

By the treaty between Great Britain and the United States of America, 19th of November, 1794 (d), Article XVIII, in order to regulate what shall in future be deemed contraband of war, it is agreed, that under the said denomination shall be comprised all arms and implements serving for the purposes of war by land or by sea; such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket-rests, bandeliers, gunpowder, match, saltpetre, ball, pikes, swords, head-pieces, cuirasses, halberts, lances,

(b) The Haabet, 2 Rob. 174.

(c) The Ringende Jacob, 1 Rob. 92.

(d) Martens, vi. 336.

javelins, horse-furniture, holsters, belts, and generally all other implements of war; and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of confiscation, whenever they are attempted to be carried to an enemy. And whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings that might thence arise, it is further agreed; that whenever any such articles so becoming contraband, according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or in their default the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention. With respect to provisions, and the mode of estimating indemnification in case of pre-emption, the article of the treaty is in accordance with the practice of the English Prize Court. As to the enumeration of contraband articles, it is merely declaratory of the law of nations (e).

The treaty between Great Britain and Denmark, 1670 (f), provides, Article III., that the kings of the two countries will not aid or furnish the enemies of either party, that shall be aggressors, with any provisions of war, as soldiers, arms, engines, guns, ships or other necessities for the use of war, or suffer any to be furnished by their subjects. This treaty is extended and explained by the con-

(e) 1 Kent Comm. 128.

(f) 1 Chalmers, 78.

vention of 1780 between the same parties (*g*), wherein the contracting parties for themselves and their successors reciprocally engage not to furnish to the enemies of each other, in time of war, any aid, soldiers, vessels, nor any effects or merchandize denominated contraband. To remove all doubt as to what is comprised under the denomination of contraband, it is agreed, that under that denomination shall be comprised only arms, as well fire-arms as other kinds of arms, with their appurtenances, as cannons, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, musket-rests, bandeliers, powder, matches, saltpetre, balls, pikes, swords, head-pieces, cuirasses, halberts, lances, javelins, horse-furniture, horses, saddles, holsters, belts, and generally all other implements of war; as also ship-timber (*bois de construction*), tar, rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly for the equipment of vessels; unwrought iron and fir planks excepted.

But it is expressly declared, that the denomination of contraband does not comprise fish and meat fresh and salt, wheat, flour, corn and other grain and pulse, oil and wine, and generally whatever serves for nourishment and the sustenance of life; all which things therefore may lawfully be sold and imported in like manner as other merchandize even into places held by an enemy of the two crowns, provided that they are not besieged or blockaded.

Fir planks being expressly excepted in the treaty, may be carried any where, except to blockaded ports. With respect to other timber, the terms of the treaty, *bois de construction*, must be understood naval construction, and must be confined to purposes of naval equipment. There had been much contest on this matter, the belligerent on one side contending that the enemy should not be supplied with timber; the neutral country on the other side contending for the liberty

of exporting its own produce, one of the great staples of the country. It is fair to presume from this situation of the parties, that there was no intention on the part of Denmark to give up the timber trade, or to abridge the exercise of that species of commerce further than the just demands of the belligerent might require. The situation of the contracting parties does not warrant the inference that there was any intention of giving up the entire benefit of the market of the other belligerent country for all other timber, but only for such as might materially affect the operations of war. If a cargo is carried to Rouen or Havre for the purpose of being sent to Paris for house building, how is Great Britain injured by that? It is not to be presumed that there was any reason for demanding a sacrifice of such a trade on one side, or that the other parties would be willing to renounce a trade so beneficial to themselves and so innoxious to the interests of the belligerent. It is to be concluded from these considerations, that it was only meant to prohibit the carrying of such timber as is fairly to be deemed ship timber. Timber has frequently from particular circumstances a definite and determinate character; it may be denoted by a particular form, as knee-timber, which is crooked timber, peculiarly useful for the building of ships; or it may be distinguished by its dimensions of size. But as to other timber generally, which is as much a thing of ambiguous use as anything can be, the fair criterion will be the nature of the port to which it is going. If it is going to Brest, the destination may reasonably be held to control and appropriate the dubious quality and fix upon it the character of ship timber; if to other ports of a less military nature, though timber of the same species, it may be more favourably regarded. It is every day's practice not to consider as included within the prohibition all that a more extended interpretation might justify; it restores spars and bulks of ordinary magnitude, unless there is something special in the circumstances attending them to shew that they have a

positive destination to naval purposes. In timber of an indeterminate nature, the judicial test is to be sought from the destination on which it is going (*h*). It has been contended, that copper in sheets, though not fit for the sheathing of vessels, is contraband under the treaty; from the accompanying words it seems not to be so (*i*).

The treaty of navigation and commerce, 1786, between Great Britain and France (*h*), provides, Article XXI., XXII., XXIII. That liberty of navigation and commerce shall extend to all kinds of merchandizes, excepting only those, which are specified in the following articles, and which are described under the name of contraband. Under this name of contraband, or prohibited goods, shall be comprehended arms, cannon, arquebuses, mortars, petards, bombs, grenades, saucisses, carcasses, carriages for cannon, musket-rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, helmets, cuirasses, halberts, javelins, holsters, belts, horses and harness, and all other like kinds of arms, and warlike implements, fit for the use of troops. The merchandizes that follow shall not be reckoned among contraband goods; that is to say, all sorts of cloth and other manufactures of wool, flax, silk, cotton, or other materials; all kinds of wearing apparel, together with the articles of which they are usually made: gold, silver coined or uncoined, tin, iron, lead, copper, brass, coals; as also wheat and barley, and any other kind of corn and pulse, tobacco, and all kinds of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oil, wines, sugars, all sorts of salt, and of provisions, which serve for sustenance and food to mankind; also all kinds of cotton, cordage, cables, sails, sailcloth, hemp, tallow, pitch, tar, and rosin; anchors, and any parts of anchors, ship-masts, planks, timber of all kinds, trees, and all other things, proper

(*h*) The Twende Brodre, 4 Rob. 33.

(*i*) The Charlotte, 5 Rob. 275.

(*h*) 1 Chalmers, 517.



either for building or repairing ships. Nor shall any other goods whatever, which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, be reputed contraband, much less such as have been already wrought or made up for any other purpose; all which things shall be deemed goods not contraband, as likewise all others which are not comprehended and particularly described in the preceding article, so that they may be freely carried by the subjects of both kingdoms, even to places belonging to an enemy, excepting only such places as are besieged, blocked up, or invested.

The treaty of navigation and commerce between Great Britain and Russia, 1766 (*1*), Article XI, provides, that permission shall be granted to the subjects of the two contracting parties to go, come and trade freely with those states, with which one or other of the parties shall at that time, or at any future period, be engaged in war, provided they do not carry military stores to the enemy. From this permission, however, are excepted places actually blocked up, or besieged, as well by sea as by land; but at all other times, and with the single exception of military stores, the abovesaid subjects may transport to these places all sorts of commodities as well as passengers, without the least impediment. All cannon, mortars, muskets, pistols, bombs, grenades, bullets, balls, fusees, flint stones, matches, powder, saltpetre, sulphur, breast-plates, pikes, swords, belts, cartouch bags, saddles and bridles, beyond the quantity that may be necessary for the use of the ship, or beyond what every man, serving on board the ship, and every passenger ought to have, shall be deemed ammunition or military stores; and if found, shall be confiscated according to law, as contraband goods, or prohibited commodities; but neither the ships, nor the passengers, nor the

(1) 1 Chalmers, 2.

other commodities found at the same time, shall be detained or hindered to prosecute their voyage.

The same convention is repeated in the third article of the maritime convention, between the same parties, June 1801, (a) to which Sweden and Denmark acceded in 1802. The last mentioned article excepts such quantity of the above mentioned articles as may be necessary for the defence of the vessel, and of those who form its equipage; and provides that all other articles, not therein enumerated, shall not be deemed naval or military stores, nor subject to confiscation, and consequently shall pass free, without the least difficulty, unless they shall be enemy's property in the sense above determined. It is also agreed, that what is stipulated in the present article, shall not prejudice the particular stipulations of either party with other powers, whereby any articles of the same kind are excepted, prohibited, or allowed. This last stipulation is unnecessary and inoperative; and the same observation applies to the words referred to, as describing the sense in which enemy's property is to be understood: which merely provides, that articles of the produce or manufacture of the enemy's country, shall not be deemed enemy's property, when they have been purchased by neutrals, and shipped on their account. The former part of the same article sets forth, that the contracting parties having resolved to provide sufficient security for the freedom of the commerce and navigation of their subjects, in the case of one of them being at war, while the other is neutral, having agreed, first, that the vessels of the neutral power may navigate freely to the ports (n) and along the coasts of the enemy; Secondly, That effects on board the

(m) Martens Trait. ix. 476. 486.

(n) That is ports not blockaded; for a subsequent part of the same article defines blockaded ports to be those, which are beset by such a force there stationed by the enemy, as makes the entrance evidently dangerous. Article iii. § 4.

neutral vessels shall be free, except contraband of war and enemy's property.

The seventh article of the treaty provides, that to obviate the inconveniences that may arise from the fraud of those, who use the flag of a nation to which they do not belong, it is agreed to establish the inviolable rule, that to entitle any vessel to be considered as the property of the country of which it bears the flag, it must have on board a captain and one-half the crew subjects of that country, and its papers and passports in good and due form; but every vessel that shall not observe this rule, or shall contravene the ordinances published on this behalf, shall forfeit all claim to the protection of the contracting parties.

These treaties confer no privilege upon goods of the subjects of the contracting parties conveyed in foreign vessels.

It was contended that this treaty rendered all goods, protected by the treaty, free in neutral ships. The argument admitted, that the more ancient treaty included the navigation only; but it was said that this treaty expresses commerce also, as well as navigation: the Court, however, held, that the commerce was commerce connected with the navigation. The extension of terms is only a more accurate expression of what was before implied. The terms of the other articles of the treaty shew that this is the true explanation. The second article stipulates, "that the ships of the neutral power may," &c.; then comes the expression on which the distinction is raised "on board neutral ships," that is ships of either of the contracting nations being neutrals, as it is expressed in the French version of the same article, "*sur les vaisseaux neutres.*" No privilege is conveyed by this treaty to the Russian proprietor, where the cargo is conveyed in a foreign bottom. It is perfectly clear that the terms do not point to anything but what is confined within

the navigation of the two contracting countries (*o*). This point was expressly decided in the case of the *Charlotte*, on the authority of the Graeffen Van Gothland, before the lords. The Graeffen Van Gothland was a shipment of masts to Cadiz in a Swedish ship. The *Charlotte* was a shipment of similar articles going in a Quebec ship to Nantes. The two cases had this circumstance in common, that the claimants were Russian merchants exporting articles of the same kind to the enemy, not in vehicles of their own country. It was held, that the treaty of 1801 does not put the commerce of Russia, with respect to contraband, on a more favourable footing than it was before; and the cargo was condemned (*p*). The treaty applies only to cases where one party is in a state of neutrality, and not where both are connected in hostilities against one common enemy. The context of the whole treaty clearly refers to such a trade only, and cannot be extended to the trade of either country, at a time when both countries are associated in war, and are bound to contribute their whole force and energy against the common enemy (*q*).

The treaty between Great Britain and the States General, 1661 (*r*), Article III., declares, that the term of contraband goods is understood to comprehend only all sorts of fire arms and their appurtenances, as cannon, muskets, mortar pieces, petards, bombs, grenades, fire crancels, pitched hoops, carriages, rests, bandoliers, powder, match, saltpetre, bullets, swords, pikes, morions, headpieces, coats of mail, halberts, javelins, horses, great saddles, holsters, belts, and other utensils of war, called in French, assortissemens servantes à l'usage de la guerre. Article IV. In this quality of con-

(*o*) *Per Cur.* The *Apollo*, 4 Rob. 161.

(*p*) The *Charlotte*, 5 Rob. 305.

(*q*) The *Eleonora Wilhelmina*, 6 Rob. 331.

(*r*) 1 Chalmers, 161.

traband goods shall not be comprehended corn, wheat, and other grain and pulse; oils, wine, salt, or generally anything that belongs to the nourishment and sustenance of life, but shall remain free as other merchandize and commodities not comprehended in the preceding article; and the transportation of them shall be permitted even to places in enmity with the said States General, except such cities and places as are besieged, blocked up, or invested.

The Treaty between Great Britain and Sweden, 1661 (*s*), Article XI. provides, that it is by no means to be understood, that that confederate, who is not a party in war, shall be denied the liberty of trade and navigation with the enemies of that confederate, who is involved in such war; provided only that no goods called contraband, and especially money; no provisions, nor arms, nor bombs with their fusees and other appurtenances; no fire balls, gunpowder, matches, cannon ball, spears, swords, lances, pikes, halberts, guns, mortars, petards, grenades, musket rests, bandoliers, saltpetre, muskets, musket bullets, helmets, head pieces, breast plates, coats of mail, commonly called cuirasses, and the like kind of arms, nor troops, horses, nor anything necessary for the equipment of cavalry, nor pistols, belts, nor any other instruments of war, nor ships of war, and guard ships, be carried to the enemies of the other confederates, under the penalty, that if either of the confederates shall seize the same as a booty, the same shall be absolutely retained. Nor shall either of the confederates permit that the rebels or enemies of the other be assisted by the endeavours of any of his subjects, or that their ships be sold, lent, or in any manner made use of by the enemies or rebels of either to his disadvantage or detriment. But it shall be lawful for either of the confederates and his people, or subjects, to trade with the enemies of the other, and to carry them any merchandize whatsoever

(excepting what is above excepted) without any impediment, provided they are not carried to those ports or places which are besieged by the other, in which case they shall have free leave, either to sell their goods to the besiegers, or to repair with them to any other port which is not besieged.

The treaty of 1661 is varied by the explanatory convention of 1803 (*t*). The first article contains an enumeration of contraband, which agrees with that contained in the former treaty, except that it omits provisions, and adds, after the words "ships of war and guard ships," the words "or any manufactured articles" which may serve directly for their equipment.

The second article provides, that the cruisers of the belligerent power shall exercise the right of detaining vessels of the neutral power going to ports of the enemy with cargoes of provisions, or of pitch, rosin, tar, hemp, and generally all articles not manufactured, which may serve for the equipment of vessels of whatever dimensions; and in like manner all manufactured articles that may directly serve for the equipment of merchant vessels, (except herrings, iron in bars, steel, copper, brass, brass wire, planks, and barks, not being oak or spars,—*planches et madriers hors ceux de chêne et esparres*: and if such cargoes, so exported in vessels of the neutral power, are the produce of its territory, and laden on account of its subjects, the belligerent power shall exercise the right of pre-emption on condition of allowing a profit of 10% per cent. on the invoice price of the cargo truly declared, or the market price either in Sweden or England at the option of the proprietor, besides an indemnification for demurrage and expenses. Article III. provides, that if the cargoes specified in the preceding article, (not being enemy's property), going with a declared destination to a neutral port, are detained on suspicion of a real destination to a port of the

enemy, and if it shall be found after due inquiry that they are really destined to a neutral port, they shall receive an indemnification for demurrage and expenses, and be at liberty to pursue their voyage; unless the government of the belligerent, having a well founded apprehension of their falling into the hands of the enemy, shall desire to purchase them, in which case they shall be purchased at the full price, which they would have fetched in the neutral port of their destination, in addition to an indemnification for demurrage and expenses. Article IV. provides, that herrings, iron in bars, steel, copper, brass and brass wire, planks and balks, except those of oak and spars, shall not be subject to confiscation, nor to the right of pre-emption on the part of the belligerent; but they shall be free on board neutral vessels, provided they are not enemy's property.

The Swedish, like the Russian, treaty applies only to cases where one party is in a state of neutrality, and not where both are connected in hostilities against a common enemy. The right of carrying pitch and tar had been a subject of much contention, this country contending that they were to be considered as contraband; Sweden, on the contrary, maintaining that they were not contraband, when they were the produce of the exporting country. After long and passionate discussion upon this subject, which irritated the feelings of the two countries for two centuries, a sort of compromise was at length adopted, and this treaty was formed as a kind of middle term, in which both parties abated somewhat of their original pretensions. It was agreed, that these articles should be considered not as absolutely contraband, nor yet as entirely free and innocent, but as liable to this exercise of the right of war, that they should be subject to seizure for pre-emption. This was the substance of the treaty that was formed for the regulation of the trade of Sweden, when that country was at peace, and in a state of neutrality towards each of the belligerent powers. Hence,

when Sweden was engaged with this country in hostility against a common enemy, it was held, that pitch and tar, the produce of Sweden and property of a Swede, on board a Swedish vessel bound to an enemy's port of naval equipment, were liable to confiscation (*u*).

Thirdly, of the conveyance of enemy's despatches. Despatches are all official communications of official persons, on the public affairs of the government. The comparative importance of the particular papers is immaterial; since the Court will not construct a scale of relative importance, which, in fact, it has not the means of doing with any degree of accuracy, it is sufficient if they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept and cut off all communication between the enemy and his settlements. It is not to be said, therefore, that this or that letter is of small moment; the true criterion will be, is it on the public business of the State, and passing between public persons on the public service? If individuals take papers coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken, relate to public concerns, be they great or small, civil or military, the Court will not split hairs, and consider their relative importance. There are no grounds on which it can proceed to make such an estimate with any degree of accuracy. What appears small in words, or what may perhaps be artfully disguised, may relate to objects of infinite importance. The Court will look only to the fact, whether the case falls within the general description or not (*u*). Hence, where a packet was put on board a ship, bound from Bourdeaux to New York, addressed to the Prefect of the Isle of France, containing a

(*u*) *The Neptunus*, 6 Rob. 403.

(*v*) *The Caroline*, 6 Rob. 465.



letter providing only for the payment of that officer's salary; that was held a despatch (*w*). But when papers are communications from a person not clothed with any public official character, they do not come within the definition of despatches. Thus, when the writer was invested with something of a public character, being stationed in America by the Dutch Governor of Batavia, to induce neutral merchants to join in speculations for the relief of the Batavian trade, and his commission was such as might exist without his being acknowledged as a public accredited minister; the Court observed, that perhaps the claimant was entitled to the benefit of the distinction that had been taken, that the papers proceeded from a person not clothed with any public official character (*x*). So, the conveyance of despatches from a hostile government to its consul-general in a neutral country, is not an offence, unless the despatches are proved to be of a hostile nature. A communication from a hostile government to its own consul in a neutral country, does not necessarily imply any thing that is of a nature hostile and injurious to the other belligerent. It is not to be so presumed. Such communications must be supposed to have reference to the business of the consul-general's office, which is to maintain the commercial relations of the hostile and neutral country. If such communications were interdicted, the functions of such official persons would cease altogether. It has been said, that the neutral country is not to interpose and carry on such communications, and is not at liberty to concert measures with the enemy, for the purpose of assisting in communications relating solely to his own commerce. But, in such a correspondence, the neutral government itself is interested. A consul-general of the enemy in a neutral country, is not stationed there merely for the purpose of the enemy's trade, but of the neutral's trade with the enemy; his functions

(*w*) *The Susan*, 6 Rob. 461. (*n*).

(*x*) *The Rapid*, Edw. 228, *vide The Caroline*, 6 Rob. 469.

relate to the neutral commerce, in which the two countries are engaged. In the transmission of such papers, the neutral country may have a concern, and an interest also; and, therefore, the case is not analogous to those, in which neutral vessels have lent their services to convey despatches between an enemy's colony and the mother country (*y*). So, of the despatches of an ambassador of the enemy, resident in a neutral country, to his own government. That the carrying of despatches between the mother country and her colonies is criminal, can hardly be doubted. The artifices of clandestinity and concealment, with which such acts have always been accompanied, strongly betray the opinion, which the individuals themselves entertain. It is the right of the belligerent to cut off all communication between the enemy and his settlements. But despatches of an ambassador, resident in a neutral country, for the purpose of preserving the relations of amity between that state and their own government, do not fall within the range of these observations. Where neutral ships are carrying the enemy's despatches between his colonies and the mother country, you have a right to conclude, that the effect of those despatches is hostile to yourself, because they must relate to the security of the enemy's possessions, and to the maintenance of a communication between them. You have a right to destroy those possessions, and the communications between them; and it is a legal act of hostility so to do. But the neutral country has a right to preserve its relations with the enemy; and you are not at liberty to conclude, that any communication between them, can partake, in any degree, of the nature of hostility against you.

Another distinction arises from the character of the person who is employed in the correspondence. He is not an executive officer of the government, simply acting in the con-

(*y*) The Madison, Edw. 224.

duct of his own affairs, within its own territories, but an ambassador, resident in a neutral state, for the purpose of supporting an amicable relation with it. He is there for the purpose of carrying on the relations of peace and amity, for the interest of his own country primarily, but at the same time, for the furtherance and protection of the interest which the neutral country also has in the continuance of those relations. That an ambassador's residence is considered as a residence in his own country, is a fiction of law, invented for his further protection only; and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege, and cannot be urged to his disadvantage. It might be thought almost to amount to a declaration, that an ambassador from the enemy shall not reside in a neutral state, if he is declared to be debarred from the only means of communication with his own. It is too much to say, that all the business of the two states shall be transacted by the minister of the neutral state, resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ambassadors from belligerent states, and the use and convenience of an immediate negotiation with them (*z*). But the circumstance of papers being received from a neutral ambassador in a hostile country, will confer no privilege. If papers be of a hostile and illegal character, it is not in the power of the neutral ambassador to sanction them, or to protect the conveyance of them. It has been held in cases of convoy, that even the interposition of the sovereign of a neutral country, will not take off the criminality of an illegal act; still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent, whose rights it is his duty to respect (*a*).

There is no criminality where despatches are not referable to

(*z*) The *Caroline*, 6 Rob. 461.

(*a*) The *Madison*, Edw. 226.

the operations of war; as, where a ship sailed before the knowledge of hostilities, carrying despatches altogether of a commercial nature (*b*). So, where, before the seizure, the Cape of Good Hope, to which port the vessel was going, had ceased to be a colony of the enemy (*c*). For in this, as in other offences, to constitute the offence, there must be a *mens rea* and a *corpus delicti*. Hence, when despatches were put on board by fraud against the master, who had used his utmost endeavours to prevent their being received; it was held, that no penalty was incurred by the ship (*d*). So, where a receipt was found, appearing to have been given by the captain, for a packet taken by him from the Governor of Batavia, to be transmitted to the Dutch minister in America, and to be forwarded ultimately to Amsterdam; but the Court was satisfied, that the paper had never been on board (*e*). The caution which a master is bound to exercise, in order to avail himself of the plea of ignorance, must be proportioned to the circumstances, under which the papers, which turn out to be despatches, have been received. If he is taking his departure from a hostile port, and still more, if the letters which are brought to him, are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. When a master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to aver his ignorance of a fact, which, by due inquiry, he might have made himself acquainted with. On the other hand, where the commencement of a voyage is in a neutral country, and it is to terminate in a neutral port, or at a port, to which, though not neutral, an open trade is allowed; in such case there is less to excite his vigilance, and therefore it may be proper to make some

(*b*) The Hope, cited *Per Cur.* 6 Rob. 456.

(*c*) The *Trende Sostre*, cited *Per Cur.* 6 Rob. 457.

(*d*) The *Lisette*, cited *Per Cur.* 6 Rob. 457.

(*e*) The Hope, cited *Per Cur.* 6 Rob. 456.

allowance for any imposition that may be practised upon him. Thus, where a master received papers at New York, in an envelope, addressed to a private person at Tonningen, who was instructed to forward them to Holland, but of this the master swore that he knew nothing, and denied all knowledge of their contents, and they came into his hands amongst a variety of other letters from private persons: the Court held the case to be excepted from the general rule, which does not permit a neutral master, carrying despatches for the enemy, to shelter himself under the plea of ignorance (*f*).

Fourthly, of the penalty. The carrying of enemy's despatches fraudulently, leads to the condemnation of the property of those, who, by themselves, or their agents, are guilty of the fraud. That the simple carrying of despatches between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection for the concentration of troops, and various military purposes, is manifest; and for the supply of civil assistance also, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of despatches may relate only to the civil wants of a colony, and that it is necessary to shew a military tendency; because, the object of compelling a surrender, being a measure of war, whatever is conducive to that event, must be considered in contemplation of law, as an object of hostility, though not produced by operations strictly military. The intercourse with the mother

country is kept up in time of peace by ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensibly neutral character, does, in fact, place himself in the service of the enemy, and is justly to be considered in that character. Nor is it an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband, that can be conveyed. The carrying of three or four cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches, may be conveyed the entire plan of a campaign, that may defeat all the projects of the belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the XIIth., and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quality, of which no account is taken, and the practice has been accordingly, that it is in considerable quantities only, that the offence of contraband is contemplated. But the case of despatches is very different. It is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy; it is a service therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. On this principle, the *Constitution*, Tate, was condemned. That was a case of carrying backwards and forwards in two separate instances, from the Havannah to Truxillo, and back again. But these circumstances do not affect the principle; for a plurality of offences is not necessary to constitute delinquency, and if the carrying of the original despatch is no offence, carrying the answer will not make it one (g). Where despatches from the

(g) The *Constitution*, cited *Per Cur.* 6 Rob. 440.

Governor of a colony were put on board and concealed, with the concurrence of the master and supercargoes, the ship and cargo were condemned. The Court held, that, though in cases of contraband, the noxious article alone is generally confiscated; that arises from the lenient practice of this country, which, in this matter, recedes very much from the correct principle of the law of nations, which authorizes the confiscation of the vehicle. This is rightly stated by Bynkershoek, to depend upon the fact, whether the contraband is taken on board with the actual or presumed knowledge of the owner. The knowledge of the master is, in law, the knowledge of the owner; *si sciverit ipse est in dolo et navis publicabitur*. This country adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight, in ordinary cases of contraband; but to talk of the confiscation of the noxious article, the despatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore, the same penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Then comes the question, whether the penalty is not to be extended to the cargo being the property of the same owners, not merely of *continentiam delicti*, but because the representatives of the owners of the cargo are directly involved in the knowledge and conduct of the guilty transaction. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken in *delicto*, he is not entitled to the aid of the Court to obtain restitution of any part of his property involved in the same transaction. This is an aggravated case of interposition in the service of the enemy concerted and continued in fraud. The cargo is liable to confiscation, not only by the general rule of *continentiam delicti*, but by the direct participation in guilt of the agents

of the cargo (*h*). So, where a Danish ship was seized on a voyage from the Isle of France to Copenhagen, having on board a packet, which was to be delivered to the French ambassador at Copenhagen, to be by him forwarded to the departments of government in France; and the master was part owner of the cargo, and had been entrusted with the management of the expedition as agent by his co-partner. In this case the master appeared to have taken charge of the packet knowingly, and, though there did not appear to have been any fraudulent concealment, he had been in the custody of a British frigate fifteen days without disclosing the fact (*i*). It is a general rule, that it is to be taken as a proof of fraud, if despatches are not produced voluntarily in the first instance; and that the master is not at liberty to aver his ignorance of the contents of a packet, where from want of proper caution he allows despatches to be conveyed on board his vessel (*k*). Thus, where a vessel was seized on a voyage from Bordeaux to New York, with a packet on board addressed to the prefect of the Isle of France, and the master made an affidavit averring his ignorance of the contents, and stating that the packet was delivered to him by a private merchant as containing old newspapers and some shawls to be delivered to a merchant at New York; the Court held, that without saying what might be the effect of an extreme case of imposition practised on a neutral master, notwithstanding the utmost exertions of caution and good faith on his part, it must be taken to be the general rule, that a master is not at liberty to aver his ignorance, but that, if he is made the victim of imposition practised upon him by his private agent or by the government of the enemy, he must seek for his redress against them. In this instance the

(*h*) The *Atalanta*, 6 Rob. 440.

(*i*) The *Constantia*, 6 Rob. 461, (*n*).

(*k*) The *Susan*, 6 Rob. 461, (*n*); The *Hope*, 6 Rob. 463, (*n*); The *Rapid*, Edw. 229.



master did not appear, from his own account, to have used any caution to inform himself of the nature of the papers; and, although the papers had not been so kept as to implicate him in the charge of a fraudulent concealment, they were not produced to the captors as they ought to have been; and it is considered as a proof of fraud, if papers are not produced voluntarily in the first instance: the ship was condemned, but the cargo was restored, as it did not appear that the master had been appointed agent for the cargo, though part of it belonged to the owner of the ship (*l*). So, where a vessel was seized on a voyage from Bordeaux to New York, having despatches on board for the officers of government in the French West Indian Islands and the Isle of France—there was also on board a French officer of rank returning to Martinique, and disguised as a merchant's clerk—the master made an affidavit averring his ignorance, and stating, that the papers were brought on board in the officer's baggage, and were stowed away in the hold for want of room in his cabin. It appeared, however, that the trunk, which contained them, had been sent on board originally with a direction that it should be stowed away in the hold. The Court observed, that the general rule must be held strong against the averment of ignorance; that the circumstances of the present case did not even approach to a case of that kind; that it was scarcely credible, that the master could have been deceived with respect to the character of a military officer of high rank so as to be imposed upon by the disguise of a merchant's clerk, which he had pretended to assume; and that he was further discredited by the representation, which he had attempted to impose upon the Court respecting the manner in which the trunk was concealed. The ship was condemned, but the cargo, though the property of the owner of the ship, was restored, as it did not appear that the master had been

(*l*) *The Susan*, 6 Rob. 461, (\*).

appointed agent for the cargo (*m*). Hence it appears, that the fraud of the master does not infect the cargo, though belonging to the owner of the ship, unless the master has been appointed agent for the cargo. But it involves the confiscation of the master's private adventure. It has been held, that this is a description of cases in which the usual indulgence of the Court in that respect would be misapplied. That it is an offence originating chiefly in the misconduct and culpable negligence of the master, and that, whilst he was acting thus culpably and wantonly with respect to the property of his owner, it could not be expected that he himself should escape with impunity, so far as his own adventure in the transaction was concerned (*n*).

Even where the carrying of despatches is not fraudulent, it subjects the claimant to the payment of the captor's expenses. It gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they may be papers of an injurious tendency, although not such on any *a priori* presumption, as to subject the party, who carries them, to the penalty of confiscation; and by giving the captors the right of that inquiry, he must submit to all the inconvenience that may attend it (*o*).

(*m*) *The Hope*, 4 Rob. 463, (*n*). As to the conveyance of military persons, see *The Friendship*, 6 Rob. 420.

(*n*) *The Susan*, 6 Rob. 461, (*n*).

(*o*) *The Caroline*, 6 Rob. 470; *The Rapid*, Edw. 231; *The Madison*, Edw. 226.

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## CHAPTER VI.

## OF LICENSES.

A **LICENSE** is a privilege granted to subjects, neutrals, or enemies, whereby their vessels and cargoes are exempted from the confiscation, that would otherwise ensue from the act, which the license permits.

It is perfectly well known, that by war all communication between the subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile states, but by the special license of their respective governments. Under this view of the matter it is clear, that a license is a high act of sovereignty; an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exemption from the ordinary consequences of war must be controlled. Licenses being then high acts of sovereignty, they are necessarily stricti juris, and must not be carried further than the intention of the great authority, which grants them, may be supposed to extend; not that they are to be construed with pedantic accuracy, nor that any small deviation should be held to vitiate the fair effect of them. An excess in the quantity of goods permitted might not be considered noxious to any extent. A variation in the quality or substance of the goods might be more significant, because a liberty assumed of importing one species of goods, under a license granted to import another, might lead to very dangerous abuses.

The license must be looked to for the enumeration of goods that are to be protected by it.

Another material circumstance in all licenses is the limitation of time, in which they are to be carried into effect; for as it is within the view of government, in granting these licenses, to combine all commercial and political considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous. Time, therefore, appears to be a very important ingredient, and a party is not to take upon himself to extend the term of a license.

Two circumstances are required to give the due effect to a license; First, that the intention of the grantor should be pursued; and Secondly, that there shall be an entire bona fides on the part of the user. It has been contended, that the latter alone should be sufficient, and that a construction of the grant, merely erroneous, should not prejudice. That is laid down too loosely. It seems absolutely essential, that that only should be permitted to be done, which the grantor intended to permit; whatever he did not mean to permit is absolutely interdicted; and the party, who uses the license, engages not only for fair intention, but for an accurate interpretation and execution; not, however, exclusive of such a latitude, as may be supposed to conform to the intentions of the grantor, liberally understood (*a*).

Where permission to export flour from an enemy's country to Spain and Portugal was given by the British consul in America, with the sanction of the British admiral on the Mediterranean station; it was held, that such permission could not operate as a license, except by the subsequent ratification of the British government. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons

(*a*) The *Cosmopolite*, 4 Rob. 8.

in a subordinate situation, it must be exercised either by those, who have a special commission granted to them for the particular business; and who, in legal language, are termed mandatories; or by persons, in whom such a power is vested in virtue of any official station, to which it may be considered incidental. It is quite clear, that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Ei rei non præponitur*; and, therefore, his acts relating to it are not binding. Neither does the admiral on any station possess such authority. He has indeed power relative to the ships under his immediate command, and can restrain them from committing acts of hostility, but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. These protections, therefore, do not result from any power incidental to the situation of the persons by whom they were granted; and it is not pretended that any such power was specially entrusted to them for the particular occasion. Persons, not having full power, may make what in law are termed sponsiones, or, in diplomatic language, treaties *sub spe ratæ*, to which a subsequent ratification may give validity; *ratihabitio mandato æquiparatur*. The government having subsequently ratified these permissions, they were held to operate for the protection of the vessels and cargoes. But the captors, being justifiable in detaining them, were held entitled to their expenses (*b*).

In the use and application of licenses the Court will not limit the parties to a literal construction. It is sufficient if they shew, under the difficulties of commerce, that they come as near as they can to the terms of the license; and, where that is done, the Court will not prevent them from having the full benefit intended by his Majesty's government. Where there is no bad faith in the parties, and no undue extension of

(*b*) *The Hope and others*, 1 Dod. 226.

the terms of the license beyond the meaning of the Council-board, any little informalities or trifling deviations shall not injure them (c). In former wars the prohibition of intercourse with the enemy was attended with very little inconvenience, as the greater part of the countries in the neighbourhood remained neutral, and presented to the belligerents various channels of communication, through which they obtained from each other such commodities as they stood in need of. While the world, therefore, continued in that state, of course licenses would be granted only in very special cases, where it appeared that there was a necessity to have direct communication with the enemy; and being matters of special indulgence, the application of them was strictissimi juris. At the same time there never was a period in which a rational exposition, allowing a fair and liberal construction to the intention of the grantor, would not have been received. There never was a period, for instance, in which it could have been contended that the words six months were subject to such a strict and literal interpretation, that a failure arising from circumstances, which the party could not control, would have the effect of vitiating the license; where he could shew that he had used all due diligence, and was prevented from completing the voyage within the time by embargoes in foreign ports, or by the fury of the elements. These are accidents which prejudice no person, and therefore the time never existed, when the party would not have been at liberty to allege such facts, and when he would not have been entitled to a virtual protection from the decisions of the Prize Court. While he was baffled by these obstructions, the intervening time was, as it were, annihilated, and he was put again in possession of the time so lost. The interval in which he was not at liberty to act was in fair construction no time as to the operation of the license. It was a construction founded upon the intention of the

(c) The Vrouw Cornelia, Edw. 349.

grantor, that, when a party had acted with good faith, and had complied with the terms prescribed as nearly as controlling circumstances would permit, he should have a fair indulgence as to these points, in which he had been prevented from a literal performance by obstructions which he could neither foresee nor obviate. This was the rule of interpretation, even when licenses were matters of special indulgence. But during the last war, in consequence of the extraordinary and unprecedented course of public events, licenses in a certain degree changed their character, and were no longer considered exactly in the same light. The commerce of the country could only be maintained either by relaxing the ancient principle entirely, and permitting an unlimited intercourse with the ports of the enemy, or by giving a greater extension to the grant of licenses. The Legislature therefore tolerated a resort to the mode of permitting trade by licenses, which, though they were so denominated, were in effect expedients adopted by this country to support its trade, in spite of all those obstacles which were interposed by the enemy. They were not matters of rare and special indulgence, but were granted with great liberality to all merchants of good character, and were expressed in general terms, requiring therefore an enlarged and liberal interpretation. At the same time, they were not free from control; restrictions, dictated by prudent caution, were annexed; and where such restrictions are annexed, they must be supposed to have an operative meaning. It is not in the power of the Prize Court to apply such an interpretation to a license as would be in direct contradiction to its express terms, or to say that effect shall be given to one part and not to another. If the permission is for a ship to go in ballast, it would be impossible for the Court to say that it shall go with a cargo, for that would not be an interpretation, but a contravention of the license. But when it is evident that the parties have acted with perfect good faith

and with an anxious wish to conform to the terms of the license, the Court is only carrying into effect the intention of the grantor, in having recourse to the utmost liberality of construction which it is in its power to apply. As a general rule therefore, it is to be understood; that where no fraud has been committed or meditated as far as it appears, and when the parties have been prevented from carrying the license into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms have not been literally and strictly fulfilled. When there is clear bona fides, the Court, though it will certainly not contravene the terms of a license, will give it the most liberal construction (*d*). But the Court possesses the mere power of interpretation; it confines itself to a reasonable explanation of the terms made use of, and cannot alter or dispense with conditions considered as essential by the government in granting the license. If the Court assumes the power of extension by favourable interpretation, it does so only when there is a total absence of mala fides, and when unavoidable obstacles have been thrown in the way of an exact compliance with the terms prescribed. When there has been a want of good faith, or a departure from the terms beyond the necessity thus imposed, the Court has not felt itself called upon to mitigate the penalties incurred by such a deviation (*e*). Where parties are acting in apparent contravention of the literal terms of their license, the captors are entitled to their expenses, though the contravention should not be such as will subject the vessel or cargo to confiscation (*f*).

The rules for the construction of licenses above laid down may be considered in respect of, First, The vessel. Secondly,

(*d*) The Goede Hoop, Edw. 327.

(*e*) The Dankbaarheid, 1 Dod. 183.

(*f*) The Goede Hoop, Edw. 336.



The cargoes. Thirdly, The course of navigation to which the license is applicable ; and Fourthly, The time for which it is operative.

First, Of the vessel to which the license is applicable.

It is not considered as an essential deviation from the terms of a license if the ships of other countries than those designated in the license have been employed, provided the different countries have the same political bearing towards this kingdom. But the Court has never gone the length of holding it to be a matter of indifference to substitute a ship belonging to a country at war for a neutral ship at the will of the holder of the license. Many reasons may induce government to grant a license to neutral ships when it would not bestow the same indulgence on ships belonging to the enemies of the country. Where an enemy's ship was represented to be neutral, and was navigated under the disguise of a neutral and under a license obtained by that misrepresentation, the ship and freight were condemned; and it was held, that the cargo would be involved in the same condemnation, if it could be shewn that the owner of the cargo was privy to the fraud (*f*).

A license for importation on board a neutral vessel will not afford protection, if the vessel employed is a British ship. There are many reasons why government might not be disposed to permit British ships to trade with the enemy, at the same time that a communication in neutral bottoms might be allowed. It was held, that the trade carried on in a British ship was neither within the reason nor the terms of such a license, and the property was condemned (*g*). A license for importation in neutral ships is no license for importation in enemy's ships, and such ships are not protected by it (*h*). But in the absence of all fraud and collusion, it is sufficient, if the vessel is visibly, and to all appearance neutral. A merchant cannot

(*f*) The *Dankbaarheid*, 1 Dod. 183.

(*g*) The *Jonge Arend*, 5 Rob. 14.

(*h*) The *Hoffnung*, 2 Rob. 162.

look further ; he cannot be supposed to look into the title deeds of the ship. And though the Court might, by its powers of inquiry, be able to detect enemy's, or British interests lurking therein, still that would not be allowed to affect the cargo, unless the importer, or his agent, could be directly affected with the knowledge of that fraud (i). A vessel is not protected by a license on board, where there is nothing to shew, that it was intended by any of the parties, to be applied to that vessel. Thus, where a vessel was captured in ballast, with a license on board, which did not appear in any manner to apply to the vessel, as it was not indorsed, and the name of the vessel did not appear in the body of it ; it was held, that the vessel was not protected. The Court is extremely unwilling to be rigorous in respect to the application of licenses to vessels, which they are intended to protect ; but they must, in some specific manner be so applied. The license may be going for the protection of some other vessel, and it would be impossible to say, that the mere circumstance of its being on board the vessel that conveys it, shall be sufficient for her protection also (k). Where a license has been granted to export a cargo, and the exportation has been defeated by the elements, or the act of the enemy, the license will protect the vessel on its return with the same cargo. The permission of government having been granted to export the cargo, the license is sufficient for the protection of the ship and cargo, not only eundo, but redeundo, where the original purpose has been so defeated. At the same time, in order to entitle himself to this benefit, it is necessary for the claimant to shew, that the cargo consists of the identical goods that were carried out, and that no others were taken on board in the enemy's port (l). So it has been held, that a license to import a cargo, may be extended by construction, to protect a vessel on her

(i) *The Hoffnung*, 2 Rob. 162 ; *The Gute Hoffnung*, 1 Dod. 252.

(k) *The Speculation*, Edw. 344.

(l) *The Jonge Frederick*, Edw. 357.

way to the port of lading in ballast, for the express purpose specified in the license (*l*). Where a license is granted to sail under any flag except that of a particular nation, a vessel of that nation is excluded from the benefit of the license, although not accompanied with the formal characteristic of the national flag. Wherever the words "bearing any flag except the French," have presented themselves to the notice of the Court, it has felt the necessity of giving them a more substantive meaning, as excluding French interests; and has held, that where French interests clearly appear, the vessel cannot be protected by the mere absence of the French flag. If otherwise, the whole French navigation might be conducted with the utmost safety; nothing else being requisite, but that a foreign flag should be substituted for the French. In this case, a French vessel, navigated under the Prussian flag, was condemned (*m*). But such a license was held to protect a vessel, although the country to which it belonged, had, before the capture of the vessel, been annexed to France. It was held, that a sudden and unexpected change in the political relations of the country to which the vessel belonged, could not deprive her of the protection of the license, where the parties had acted fairly under it (*n*). Where a license was granted to purchase a vessel, the property of an enemy, in satisfaction of a debt due to the purchaser; such purchase was held to be valid, though the agent by whom the purchase was effected, had, without authority from his principal, given a bond for restitution at the conclusion of the war (*o*).

Secondly, of the cargo, to which a license is applicable. A special license will not enure to the protection of any thing beyond its specific purport. Hence, a license to British merchants by name, or their agents, or the bearers of their bills of

(*l*) The *Cornelia*, Edw. 360.

(*m*) The *Bourse*, Edw. 370.

(*n*) The *Jonge, Clara*, Edw. 371.

(*o*) The *Clio*, 6 Rob. 67.

lading, to import certain articles, will not protect such articles, being the property of an enemy (*p*). Nor will such license protect property of other British merchants, whose accounts and risk were expressed in the bills of lading. A license granted to one person, cannot be extended to the protection of all other persons, who may be permitted by that person to take advantage of it. The great principle in these cases is, that subjects are not to trade with the enemy without the special permission of the government; and a material object of the control, which government exercises over such a trade is, that it may judge of the particular persons, who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war. In this case, the persons named in the license were not the importers, because the real and effective bills of lading consigned the goods to other persons. The persons named in the license took the license for themselves only, and could have no agents, because they appeared never to have had any interest. Nor could the claimants stand before the Court as bearers of the bills of lading of the persons named; because, although there was a general bill of lading on board, consigning the property to the persons named in the license, it appeared clearly, that this was meant to operate only as a formal paper, by which no right whatever was to be conveyed, there being other bills of lading on board, by which the master was bound to deliver the several parcels to the order of the Dutch shippers. In this case there was no fraudulent intention; but the Court held, that there was no character in which the claimants could receive restitution. The case would have been different, if the claim had been made under bills of lading, which the holders of the license, after having conducted the importation from the enemy on their own account, had transferred to the claimants (*q*). But, an inaccurate description, will not deprive the persons so described, of the

(*p*) *The Bourse Van Koningsberg*, 2 Rob. 169.

(*q*) *The Jonge Johannes*, 4 Rob. 263.

protection of the license, where the government are apprised of the intention of including the persons so described. Under such circumstances, where a person took a license in the name of himself and Co., meaning under that denomination, to include persons who had agreed to take part in the shipment made under the license, they were held to be protected (*r*).

A license to a British merchant to import will not protect the importation of goods exported by him as a merchant in the enemy's country (*s*). But where a license is general, it is of no consequence who are the individuals who act under it; provided they comply with the conditions annexed to it. Hence it was held to be immaterial that such a license, which had been granted here in the usual manner, had afterwards been purchased for money in the enemy's country (*t*). A license to a British merchant will not enure to the protection of enemy's property, unless the words "to whomsoever the property may belong" are inserted therein. Where those words occur, they have been held to exclude all inquiry into the proprietary interest (*u*). A license to export enumerated articles to an enemy's port will not protect articles not enumerated, though shipped with an ulterior destination to a neutral port. If this were permitted, a merchant might put any kind of articles on board under such pretences, and it would be impossible to prevent them from going without molestation into the hands of the enemy. Their honesty of intention cannot be alleged as a justification in a course of transaction, which if allowed, would leave no means of preventing fraud in an infinite number of other cases (*v*). A license to import specific goods will not protect goods not

(*r*) *The Christina Sophia*, cited *Per Cur.* 4 Rob. 267.

(*s*) *The Jonge Klassina*, 5 Rob. 297.

(*t*) *The Acteon*, 2 Dod. 52.

(*u*) *The Consine Maryanne*, Edw. 346.

(*v*) *The Vriendschap*, 4 Rob. 96.

specified (*w*). But, where lace was shipped on board a vessel licensed to import raw materials, under an order given before hostilities, which the importer had no opportunity of countermanding, it was restored, though not protected by the license (*x*). A license to proceed to an enemy's port in ballast will not protect a vessel proceeding thither with a cargo; and a plea, that the cargo was put on board by compulsion is inadmissible. If such an excuse were admitted force would in all cases be employed, and in many collusively (*y*). It would be impossible for the Court to protect itself otherwise against the incessant attempts, that would be made to elude its vigilance by pretences of this nature. It could never discover with certainty whether a transaction taking place in an enemy's port was voluntary or not. Compulsion would always be pleaded, though in many cases the parties would be acting collusively. It is necessary therefore to keep the door shut against such explanations (*z*). There is a plain distinction between this class of cases; and that in which the license is contravened only in point of time, where it has been held, that the violence of the enemy is a sufficient excuse. In the latter class of cases the party licensed takes on board only the cargo which he is licensed to carry; there is therefore no benefit to the enemy beyond the terms of the license; nor ground for any suspicion of collusion, since demurrage is not an advantage, but a loss to the party licensed.

Where a vessel, licensed to proceed to a port in ballast, had half a cargo of timber on board, described as ballast, but accompanied with a certificate of origin, the license was held to be defeated (*a*). So where a vessel, licensed to carry a

(*w*) The *Goede Hoop*, Edw. 336; The *Jonge Clara*, Edw. 374.

(*x*) The *Juffrow Catharina*, 5 Rob. 141.

(*y*) The *Catherina Maria*, Edw. 337.

(*z*) The *Seyerstadt*, 1 Dod. 241.

(*a*) The *Wolfarth*, Edw. 365.

cargo of corn, had a quantity of fire-arms concealed under her cargo (*b*).

The shipment of articles not enumerated, under a license to ship enumerated articles, has been held not to be a fatal departure from the terms of the license; for there may be a mistake, as to the description of goods enumerated and not enumerated. But an essential and total departure from the conditions of the license, accompanied with fraudulent intention, is a total defeasance of the license as to all who are privy to the fraud. Thus, where a considerable part of the cargo of a vessel was taken on board at a port to which the vessel was licensed to proceed for the mere purpose of obtaining a clearance to the port, to which she was licensed to export a cargo; it was held, that the license was defeated both as to the ship and cargo being the property of the same owner. The exportation of the produce and manufactures of this kingdom is undoubtedly an object of great importance; but it may be a matter of serious injury to this country, if the commerce of the enemy is to be carried on in security under the abuse of British licenses. The parties may take heavy goods from the ports of this country, and then carry on the coasting trade of the enemy in more valuable articles. By such a misapplication of licenses the advantages in favour of the commerce of this country would be greatly overbalanced: the consequences, which must ensue, would be mischievous in the extreme. It is therefore the duty of the Court, as far as lies within its power, to guard against such fraudulent application of licenses (*c*). Where a license is expressly for importation, it must be taken to have been the understanding of the parties, that the license was to be for importation only, and not for re-exportation (*d*). A license was granted to a

(*b*) *The Nicoline*, Edw. 364.

(*c*) *The Henrietta*, 1 Dod. 168.

(*d*) *Per Cur.* *The Vrouw Deborah*, 1 Dod. 164.

neutral vessel to import a specified cargo from Amsterdam, and to export from London to Amsterdam a cargo of permitted goods, on condition that the cargo imported should be put into government warehouses, and there kept as a security until the return cargo had been exported. The ship having taken on board her cargo, sailed from Amsterdam, and was obliged to put into Medemblick, which bears the same relative situation to Amsterdam that Gravesend does to London. At Medemblick it was necessary to unlade the cargo, which was found to be so much damaged, that it was not fit to be put on board again. The old cargo was therefore sold, and a new one of the same identical nature with the first, corresponding with it both in substance and quality, was put on board after the time, for which the license was granted, was expired. It did not appear, that there was time to obtain a fresh license. If the ship had received damage after her arrival in the Thames, and had then gone back to the Texel for the purpose of taking a fresh cargo, the same indulgence could not have been reasonably expected; because then the parties might have had access to the government, and might have applied, without loss of time, for a fresh license. The case is very different where the ship is in a distant port, and when the foreign shippers are acting for persons in this country without the ready means of communicating with their principals. The ship would not have been permitted to come in ballast, and the damaged cargo would have been of no value, as a security. It was held, that under these circumstances the parties were not deprived of the protection of the license. The case would have been widely different if goods of a different description had been taken instead of the original cargo. Here the original purpose was pursued; no new speculation was originated, nor was there any change, except such as was produced by time and unavoidable accidents; and it was held, that the transaction came within the latitude, that by a just and fair



interpretation of the license ought to be allowed (e). A license was granted to import a specified cargo from Charente in a vessel expressly named, or in any neutral vessel. The shipment could not be made at that port, all foreign vessels there being under sequestration. Part of the cargo was sent by land to Bordeaux, and there shipped in one vessel; and, the sequestration being taken off a few days afterwards, the remainder was shipped from Charente with the license, and a certificate that the remainder of the cargo had been shipped from Bordeaux. It was held, that the whole cargo and both vessels were protected by the license. If, under cover of this license, there had been imported in two vessels what no one mercantile vessel in the port of Charente could hold, it might have been considered a fraud; but the whole quantity was not beyond the capacity of vessels frequently sailing from that port. The quantity in the two ships was only equal to what might have come, and was intended to come in one (f).

Thirdly, Of the course of navigation to which a license is applicable.

Licenses imply, that the navigation shall be for the benefit of the state, by which they are granted. Permission from the British government to go from one port of the enemy to another requires, that the vessel should be going thither for the purposes of British trade. Licenses to foreigners are granted on a prospect of reciprocal advantage to the government which grants, and to the foreigners who receive them; and there must, in all cases, be an intention conformable to the objects, for which the license has been granted. Parties are not to take advantage of the permission to proceed to the port of the enemy, without an engagement that the vessel is proceeding thither for the purposes of a trade immediately connected with this country; for British licenses cannot be presumed to be granted for the purpose of carrying on the

(e) The *Wohlforth*, 1 Dod. 306.

(f) The *Vrouw Cornelia*, Edw. 349.

enemy's trade without any ulterior view to British use and advantage. There is a total failure in the effect of the license where it is applied to a vessel proceeding to an enemy's port for sale (*g*). A license is vitiated, when it is altered by changing the port of shipment without any communication with the government, by which it was granted. The policy of granting licenses at all is, that the government may see what communication is going on with the enemy; and therefore a case, in which the real port is not disclosed, does not come within that latitude of interpretation, which from the necessities of commerce might be tolerated. Parties cannot be permitted to take licenses for one purpose and apply them to another (*h*). A license to an enemy to import a cargo into a particular port is confined to the port, for which it is granted, or at least to one nearly allied and contiguous to it. Where an enemy's ship and cargo belonging to the same owner, and licensed to go to Dublin north about, were taken going to Leith, a place not named in the license nor connected with that which was named, and to be reached by a course totally different from that indicated, the ship and cargo were condemned. There is no proposition more universally admitted, than that an enemy has no right to trade with the ports of this country, except by a special permission of the government, and that he must comply strictly with the conditions under which that permission is granted. No voluntary deviation from the course pointed out can be on any account tolerated; and the only excuse, that can be allowed for a departure from the terms prescribed, is, that it was done under the pressure of an irresistible necessity. When the party is not within the terms of the license, the character of enemy revives, and the property of an enemy is subject to confiscation, according to the laws of all civilized states. It is the duty of a merchant resident in a hostile country, who wishes

(*g*) The Speculation, Edw. 345.

(*h*) The Twee Gebroeders, Edw. 95.

to trade with the ports of this kingdom, to state to the government in the most full and explicit manner the purpose of his voyage and the place to which he intends to go; and it is then for his Majesty's government, being put in possession of the plan and design of the party, to decide whether it will permit such a course of proceeding. But to come with a representation of one kind, and to apply the license obtained under that representation to the protection of a transaction totally different, can never be permitted. Application was made to the Privy Council to permit the enemy to trade with one of the ports of this country, and under the permission so obtained, the parties thought proper to trade with another and a distant port, very differently circumstanced and in a different and distinct part of the United Kingdom. To permit such a departure from the terms of the license would be to throw open not one port only, but all the ports of his Majesty's dominions to the enemy, and would be quite incompatible with that vigilance and control which the government is bound to exercise over the trade of the enemy with its own subjects. The present case bears no analogy to the cases, in which ships have been held to be protected by their licenses. Those were the cases of ships coming to this country under the wish, rather than the intention of the owners, that they should proceed further; and which were acting in conformity with the terms of their licenses, and were in the permitted branch of their voyage, at the time when they were captured. Here there was an entire deviation as to port and course, and the Court held, that although there might be no *mala fides* in the parties, it could not divest the captor of a right which he had acquired by the detention of a ship so denuded of all protection from the license, under which she was claimed (*i*). A license, expressed in general terms, to authorize a ship to sail from any port with a cargo, will not authorize her to sail

(i) *The Manly*, 1 Dod. 257.

from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the license, otherwise a blockaded port should be taken as an exception to the general description in the license (*A*). Where a deviation was averred by the master to have occurred in consequence of damage received in a gale, which made it necessary for the vessel to put in to an interdicted port; it was held, that this averment could not be established by the unsupported testimony of the master and crew, without proof of an original destination in conformity with the license. Further proof was ordered, and upon failure of evidence of such a destination, the ship was held not to be protected (*I*). A vessel is not permitted to touch at an interdicted port for orders under a license for a direct voyage. This is a rule which the Court has felt it necessary rigidly to adhere to, except in those cases where the vessel had quitted the intermediate port with the identical cargo which she had carried in, and was actually proceeding for her lawful destination at the time of the capture. In those cases, the presumption that there was an intention of delivering at the intermediate port was repelled by the fact, that the ship had come out again with the same cargo, and the Court therefore relaxed the rule. The rule is founded not only upon the presumption, that at the intermediate port the vessel might receive another destination, but that she might actually deliver her cargo at that very port. The Court cannot inquire, nor has it the means of ascertaining, whether there was any mala fides in the contemplation of the parties; it can merely look to the fact, whether the vessel was going to an interdicted port or not; and if so, the presumption of law must be, that she was going thither for the purpose of violating the license. The fact may in some cases be otherwise, and the rule may at

(*A*) *The Byfield*, Edw. 190.

(*I*) *The Europa*, Edw. 342.

times operate with severity upon innocent persons, but it is a sacrifice that must be made to the general security (*m*). But this rule does not apply when the fact of a port being interdicted was not known at the time when the vessel sailed (*n*), or when the license contains a permission for the vessel to touch at the port (*o*). When a license authorized the importation of a cargo into Leith from a port of the enemy, and the vessel sailed for Leith with an ulterior destination to Bergen, if the permission of government could be obtained for that purpose; it was held, that such ulterior destination did not vitiate the license for the voyage to Leith. It might not be possible for the parties in a foreign port to obtain the exact kind of license, that would authorize the continuous voyage to Bergen, and therefore they divide the voyage, and proceed first to a British port, avowing the ulterior destination at the bottom of the license. Had the vessel been captured on the ulterior branch of the voyage, this license would have been no protection, but she was actually proceeding to the port of Leith at the time of the capture, and under a sufficient protection for that branch of the voyage (*p*). Where a license was granted to proceed to any port of the United Kingdom, provided that, if the vessel should be destined to any port of this kingdom south of Hull, she should stop at Dundee or Leith for convoy; it was held, that the words this kingdom appeared in this license to be placed in some degree of opposition or exception to the words United Kingdom, which had been used in the antecedent part of the sentence, and that the condition applied only to vessels destined to ports of England south of Hull (*q*). When a license provides that the vessel shall touch at a certain port for convoy, that provision is a substantive condition of the

(*m*) The *Fran Magdalena*, Edw. 367.

(*n*) The *Emma*, Edw. 366.

(*o*) The *Hoppet*, Edw. 369.

(*p*) The *Henrietta*, Edw. 363.

(*q*) The *Hector*, Edw. 379.

license, by the violation of which the license is altogether vitiated, and cannot enure to the protection of the vessel or any part of its cargo; unless it can be shewn, that from stress of weather, or some other insurmountable obstacle, the condition could not be complied with; in which case the Court would take upon itself to do that, which it must presume the government would have done under the known rule of law, that no persons can be bound to impossibilities (*q*). The reason for introducing this condition is, that vessels containing naval stores may be subject to British inspection in that part of their navigation, which brings them into the neighbourhood of the ports of the enemy. It is evidently introduced for that purpose; and being so can never be considered as a condition to be waived at the option of the party, who has accepted it. The condition is fundamental, and the breach of it must be fatal (*r*). But where a British admiral had directed a deviation for the purpose of taking convoy at another place, the Court felt itself bound to uphold the acts of the admiral, though it did not approve of the construction which he had put upon the license (*s*).

Fourthly. Of the time for which a license is operative. A license does not act retrospectively, and cannot take away an interest, which is vested in the point of law in the captors. Where a vessel was captured on the 24th of January, with an expired license on board, and was claimed under another license, bearing date the 20th of January; but it appeared from the claimant's affidavit, that application for a license in one form was made on that day and refused, and some days after a license was granted in another form, and the date was carried back to the 20th: the Court held, that to give protection the existence of the license at the time when the capture took place must be presumed. Here the party had

(*q*) The *Europa*, Edw. 358; The *Minerva*, Edw. 375.

(*r*) The *Minerva*, Edw. 375.

(*s*) The *Anna Maria*, 1 Dod. 209.

not averred that to be the case; and the style, in which he expressed himself in the affidavit, implied so absolutely the contrary, that the contrary must be taken to be the fact. It was pronounced, that neither his license, nor that which was on board at the time of the capture, was sufficient to protect the ship and cargo (*s*). A license is an instrument in its very nature prospective, pointing to something which has not yet been done, and cannot be done at all without such permission. Where the act has been already done, and requires to be upheld, it must be by an express confirmation of the act itself, or by an indemnity granted to the party; but a license necessarily looks to that which yet remains to be done, and can extend its influence only to future operations. It is true, that it has been held in the Prize Court, as well as in the Courts of common law, that the king may, for reasons of state, release a prize as against the interests of the captors. The captors bring in their prizes, subject to such interposition on the part of the crown; but it is of very rare occurrence, and, speaking with all due reverence, ought to be of very rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country. In such cases, there can be no serious doubt of the authority, or of the intentions of the crown. The order for release recites the capture and detention, and proves the knowledge and intention of the crown acting upon those facts. But the council has no such power, and could have no intention of going beyond the powers conveyed to it by the act of Parliament, which extends only to the granting of licenses (*t*). So, a license not on board the vessel, but indorsed for it by the shipper after the capture, is no protection (*u*). Where the date of a license has been altered, the license becomes a

(*s*) *The Vrouw Deborah*, 1 Dod. 160.

(*t*) *The St. Ivan*, Edw. 376.

(*u*) *The Fortuna*, Edw. 236.

mere nullity. A vessel was captured with a license, purporting to be dated on the 8th of October, but it appeared, from an affidavit brought in by the claimant, that the license had been granted on the 8th of September. It was said, that, although there might have been a fraudulent alteration in the date of the license, yet the holders, who were entirely ignorant of the alteration, and who purchased the license at a large price in market overt, ought not to be the sufferers. But there are many cases, in which it is unavoidable, that an innocent man should suffer for the fraud of others. If I take adulterated money, it is every day's experience, that I suffer for it by loss, though no party to the fraud. In such a case, it is not possible to produce sufficient evidence to satisfy the Court, that the alteration of the date might not be the act of the party himself, by whom the benefit of the license is claimed. It is not necessary to infer fraud in the particular case, for the Court must, for the sake of guarding against fraudulent acts of this kind, adhere to the general rule; that the party claiming the benefit of the license must shew a license unimpeached. If any other rule were to prevail, the consequence would be, that a door would be opened for the indefinite extension of licenses; for they might be prolonged at will, not only by the hostile government itself, but by every person resident in the enemy's country (*v*). Where a license was granted to a Dutch ship to go to a Dutch colony, then in British possession, but intended to be restored to the Batavian Republic, under the treaty of peace then in contemplation; it was held, that it would not extend to the protection of the vessel in the event of a new war breaking out after the conclusion of the definitive treaty of peace. Whilst the island was in British possession, it was an indulgence to allow Dutch vessels to sail with this destination, on which they could not have ventured without the special protection of a



license. The license was granted during the pendency of the negotiation, whilst it was uncertain, whether hostilities might not be renewed, and whilst it was probable that the cruisers, then in commission, might retain their legal authority to seize; and therefore its terms are to be referred to the state of affairs then existing. Peace having been concluded, this license was necessarily done away and destroyed, having no subject-matter to act upon. At the time of seizure, therefore, this vessel was to be considered on the ordinary footing of other Dutch ships (*w*). Where there is clearly an absence of all fraud, and of all discoverable inducement to fraud, the Court will go the utmost length that fair judicial discretion will warrant, though there may, under such circumstances, have been a considerable failure in the literal execution of the terms of the license. Where a license expired on the 15th of May, and the ship did not sail till the 29th of June, and was captured on the same day; but it was averred, that the delay had arisen from an embargo imposed by the enemy, and no fraud was proved or suggested; restitution was decreed. It was argued, that some fraud or other must be presumed from the length of time that had elapsed after the expiration of the license; but the Court held, the natural presumption to be, that the party would not countenance an unnecessary delay, which must be contrary to his own direct interest. This furnishes a strong ground to suppose that it was by accident, that the ship was prevented from completing her voyage within the time expressed by the license. If it could be shewn that the license had been used before, and that the delay arose from its previous use, or that there was any other fraudulent purpose to be answered, the Court would call for more particular explanations; but as no fraudulent motive had been pointed out, it must suppose, that the party was not dilatory in furthering the completion of his own mercantile adventure;

and looking to the probability of the fact arising from the local circumstances of the country in which the transaction originated, and the conduct of the enemy's government at that particular period; it did not even require further proof of the existence of an embargo (*x*). So, where a vessel, on her arrival, was placed under embargo, and the cargo which had been ordered, and was ready to be put on board, was warehoused, until the embargo was taken off, and was then shipped long after the expiration of the license; the ship and cargo were restored, although the government had ceased to grant licenses of that particular description. Where a party has, through his own laches, suffered his license to expire, he has no right, after government has changed its policy, to call upon the Court to give it new life. But where a license has been fairly acted upon, as far as the party was enabled to proceed, the Court is not called upon to put the transaction in motion, but to protect its progress; and such a case is fairly entitled to that protection which it would have derived from the license, at the time when it was put in operation and was impeded by extraneous circumstances. This is no novel principle: it is the application of the common and known rule of law *nunc pro tunc*. The Court will accept that as done now, which would have been done before, but for insurmountable difficulties. When the Court is satisfied of the identity of the transaction, and that all fair diligence has been used in order to its completion within the time prescribed, it will look no further. It will not call for the production of unnecessary and expensive proof (*y*). Where the party has used his best endeavours to fulfil his engagement, and has been prevented from finishing the transaction in due time, by the violence of the enemy, the Court will decree restitution, though the government may have refused to renew the license. The refusal of the government leaves the princi-

(*x*) *The Goede Hoop*, Edw. 327.

(*y*) *The Johan Pieter*, Edw. 354.

ple, upon which the Court is in the habit of acting, untouched; and, therefore, where the delay arose solely by the restraint imposed by the enemy, the property was restored (*z*). The indulgence extended to cases of expired licenses, embraces the difficulty of procuring ships, and all other insurmountable impediments, of whatever description; and the Court will not call upon the parties to negative an imputation of having used the license before, where there is nothing to raise a suspicion of such an abuse (*a*). Where, from the difficulty of procuring shipping, the license had expired, but the vessel had been despatched with a cargo in the expectation of procuring a fresh license, which had been actually granted and forwarded for the protection of the ship before its capture; restitution was decreed (*b*). Where a vessel, having arrived and delivered its cargo in this country, after the expiration of the license, was, upon this ground, captured on its return voyage; it was held, that if there had been any improper delay in the earlier part of the voyage, it was effectually purged by the arrival of the ship, and the delivery of its cargo. The vessel was restored, and the captors' expenses refused (*c*).

(*z*) *The Æolus*, 1 Dod. 300.

(*a*) *The Sarah Maria*, Edw. 361.

(*b*) *The Carl*, Edw. 339.

(*c*) *The Freundschaft*, 1 Dod. 316.

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## CHAPTER VII.

## OF RANSOM.

**RANSOMS** are contracts entered into at sea, whereby a captain engages for the release and safe conduct of the captured vessel, in consideration of a sum of money, which the master of the captured vessel, on behalf of himself and the owners of his ship and cargo, engages to pay and for the payment of which he delivers a hostage as a security (*a*). The contract is drawn up in two parts; of which the captor has one, which is called the ransom bill; the master of the captured vessel has the other, which operates as his safe conduct (*b*). The regulations of the French ordinances require, that the safe conduct to the ransomed vessel should be granted only for its return to its own port, unless the vessel be nearer to its port of destination. There are some other cases in which a passport may be granted to allow the vessel to continue its voyage. By the ordinance of 1692 it is provided, that a safe-conduct can only be granted for the time that is absolutely required for the vessel to reach its port. The ordinance of 1716 provides, that it shall not be granted for a longer time than six weeks (*c*). The port to which the ransomed vessel is bound to return must be expressly mentioned in the safe-conduct (*d*). The same ordinance required the captor to take as hostages one or two of the principal officers

(*a*) Pothier, Tr. de Prop. i. 2, iv. § 127; *et vide* 4 Rob. 402.

(*b*) Valin Tr. xi. 2, iii; Pothier, *ibid.* §§ 129, 130.

(*c*) *Ibid.*

(*d*) Pothier, *ibid.* § 131.

of the captured vessel. In practice one only was taken (*e*). The captor, on his return to port, was bound to report the facts to the officers of the Admiralty, and to deliver up the hostage, who was detained as a prisoner of war, until the ransom was paid (*f*). The safe-conduct operates as a protection to the ransomed vessel from all ships of the country of the captor and its confederates, during the time therein expressed. It is binding upon the ships of the country of the captor, as given by the authority of its sovereign; and upon those of its allies, as an obligation necessarily implied in every confederacy (*g*). The master of the vessel binds himself for the payment of the stipulated sum; and his contract on their behalf is binding upon the owners of the ship and cargo to the extent of their respective interests. The master has an implied right to make contracts for the benefit of the ship and cargo; and the owners are bound by all contracts which he thinks fit to make for that purpose (*h*). In addition to the sum stipulated for ransom, they are also bound to pay for the maintenance of the hostage (*i*). If no hostage were taken, the ransom bill would be equally valid. But according to the practice of nations hostages are taken as a security, because otherwise it would be difficult to enforce the payment of ransom during the war (*k*). The ransom and charge for the maintenance of the hostage are in the nature of general average; for a ransom is in effect a redemption of the ship and cargo (*l*). The hostage has a right of action for the purpose of compelling the performance of the contract, which is necessary to set him at liberty, against the master and against the owners of the ship and cargo; for they are bound

(*e*) Val. Tr. xi. 2. viii.—3, ii. Pothier, *ibid.* § 132.

(*f*) Val. Tr. xi. 2, xii.—3, iii. Pothier, § 133.

(*g*) Val. Tr. xi. 2, xvii.; Pothier, *ibid.* § 135.

(*h*) Pothier, *ibid.* § 136.

(*i*) Val. Tr. xi. 2, xiii.—3, iv. Pothier, § 137.

(*k*) Val. Tr. xi. 3, i.

(*l*) Val. Tr. xi. 3, x.

by all contracts made by the master for their benefit, and the claims of the hostage are a charge upon the ship and cargo (*m*). By the practice of the French Admiralty a French vessel, that had been ransomed, was arrested on its return, and detained until the owners of the vessel and cargo had procured the release of the hostage and paid his expenses, or given sufficient security for that purpose (*n*). The master cannot bind the owners beyond the value of the ship and cargo, and they may always discharge their liability by abandonment; in which case the master is personally liable for the payment of the ransom and expenses of the hostage (*o*). In case of the insolvency of the master, the captor is bound to release the hostage on payment of the sum, for which the ship and cargo are sold by public authority; although the sum specified in the ransom bill exceeds that amount (*p*). In the case of *Kelly v. Grant*, it was determined that the owners were not liable beyond the value of the ship and cargo. If they be delivered up in discharge of the ransom bill, that is an indemnity (*q*). In the case of *Graham and Yates v. Hall*, before the Delegates, on the 3rd of July, 1783, the Judge of the Admiralty first held, and on appeal four Civilians and three Judges unanimously determined, that the captain could not bind his owners beyond the value of the ship and cargo; and the owners having abandoned the ship and cargo, the Court dismissed the suit, which was brought by the hostages against the owners to compel the owners to redeem them, by paying the full amount of the ransom bill. But the Court of Admiralty and the Court of Appeal held, that by the delivery up of the ship and cargo the owners were discharged. The

(*m*) Pothier, *ibid.* §§ 142, 143.

(*n*) *Ibid.* § 144.

(*o*) Val. Tr. xi. 3, xii.

(*p*) Val. Tr. xi. 1, xv.—3, xiii. xiv.

(*q*) Cited by Willes and Buller, Justices, *Arguendo*; *Yates v. Hall*, 1 T. R. 76. 80.

money arising from the sale of the ship and cargo was then in the Admiralty, and all the doctors agreed, that their Court would not suffer the money to be taken out till the hostages were released; and that the Court of Admiralty in France, on having proof that the money was in our Court of Admiralty, would order the hostages to be released (*r*).

If the vessel ransomed perish by storms, the ransom is not discharged thereby; for the captor guarantees the vessel against all dangers from the cruisers of his own country or its allies, but not against the perils of the sea; unless a clause providing for that contingency be expressed in the contract. A clause providing that the ransom should not be due, if the vessel should founder at sea, would not extend to a case of wreck. If it were so extended, the master might wreck the vessel so as to save the most valuable parts of the cargo, for the express purpose of discharging the ransom (*s*). Where a ransomed vessel is captured a second time out of the course, or beyond the time, prescribed by the safe conduct, and condemned; the ransom bill is discharged, and the stipulated amount is a charge upon the proceeds of the ship and cargo, of which only the surplus is payable to the second captor (*t*). Where the captor's vessel is captured with the ransom bill, the ransom bill is discharged; and having been so discharged, it cannot be revived by recapture (*u*). So where the captor, having transmitted the ransom bill, is taken with the hostage on board, the ransom is discharged by capture (*v*). But in other cases the hostage is a mere collateral security, so that the ransom bill is not discharged by his escape or death (*w*). But where the captor's vessel is taken after delivery of the hostage and

(*r*) Cited by Buller, J., *Arguendo*, *Yates v. Hall*, 1 T. R. 80.

(*s*) Val. Tr. xi. 2, § xxvi; Pothier, *ibid.* § 139.

(*t*) Val. Tr. xi. 2, xix; Pothier, *ibid.* § 139.

(*u*) Val. Tr. xi. 2, xiv.

(*v*) Val. Tr. xi. 2, xiv. xv.—3, xi.

(*w*) *Ibid.* Bicord v. Bettenham, 3 Burr. 1734

ransom bill, the ransom remains due notwithstanding the capture. In that case there is nothing on board that represents the ransomed vessel; and where the ransom bill and hostage have been conveyed to a place of safety, it is the same thing as if the vessel had been conveyed thither as a prize, in which case it would enure to the benefit of the captor, notwithstanding the subsequent capture of his own vessel (*x*). So where the vessel of the captor was captured with the ransom bill concealed on board, which was never delivered up to the captors, nor ever possessed by them; it was determined, on the authority of Grotius, that under these circumstances there never had been any capture of the ransom bill, and that the ransom was still due. For no man can be said to have possession of that, of which he does not even know the existence (*y*). Where the captor's vessel was captured with the ransom bill and hostage on board; but the ransom bill contained a special clause that the ransom should be payable, although the captor's ship should be captured with the hostage and ransom bill, and an action was brought by the captor in his own name, Lord Mansfield delivered his opinion in favour of the plaintiff; but Willes and Buller Justices, thinking the Courts of common law had no jurisdiction, and that that objection might be taken, though not pleaded, and Ashurst, J., expressing doubts upon that point, judgment *pro formâ* was given for the plaintiff, in order to give an opportunity of bringing a writ of error. Afterward, by the unanimous opinion of all the Judges of the Common Pleas and the Exchequer; who concurred in holding, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war, the judgment of the Court of King's Bench was reversed (*z*). This rule works no injustice during the life of the hostage, for

(*x*) Val. Tr. xi. 2, xvi.

(*y*) *Corme v. Blackburne*, 2 Doug. 640; Grot. iii. 21, xxviii.

(*z*) *Anthon v. Fisher*, 2 Doug. 648, (*n*).



proceedings on the ransom bill may be had in his name. But in case of his death, this rule would suspend the remedy of the captor during the war. In the case of *Ricord v. Bettenham*, Mr. Blackstone, who was to have argued in support of this objection (the hostage being dead,) said, that he had made inquiries abroad, and had answers from very eminent lawyers in France and Holland, "that such an action had been allowed, and on principles that could not be disputed;" and therefore he did not choose to argue it; for the only objection, which seemed to weigh in the former argument, was, that such an action would not lie in other countries of Europe (a). It seems probable, that in such case the Court of Admiralty would hold in analogy to the cases of alien enemies suing for wages earned on board vessels protected by licenses, that the parties to the contract are estopped from taking the objection (b).

The ransom of vessels being considered less beneficial to the state, than their capture, by the French ordinance of 1756 captains of privateers were forbidden to ransom any vessel, until they had sent in three prizes in the course of their cruise. But this ordinance was practically inoperative (c). For the same reason, and because the power of ransoming vessels was deemed to be very liable to be abused by captors, to the great inconvenience of neutral trade, it was taken away by acts of Parliament in England; except in cases of necessity, to be allowed by the Court of Admiralty (d). In the case of *Havelock v. Rockwood* it was held, that the purchase of a captured vessel by the owner from the captor in a neutral port, before condemnation, is a ransom within the meaning of these acts (e).

(a) 3 Burrow, 1741.

(b) *The Frederick*, 1 Dod. 266; *The Maria Theresa*, 1 Dod. 303.

(c) Val. Tr. xi. 1, vii.; Pothier, *ibid.* § 128.

(d) 22 Geo. 3, c. 25; 35 Geo. 3, c. 66. ss. 35, 36; 45 Geo. 3, c. 72, ss. 16, 17, 18, 19.

(e) 8 T. R. 268.

## CHAPTER VIII.

## OF RECAPTURE AND SALVAGE.

SALVAGE may be considered with respect to the recapture of property; first, of the subjects of Great Britain; secondly, of allies; thirdly, of neutrals; fourthly, with respect to persons entitled to claim it.

FIRST. Of the recapture of British property. No question of salvage arises in the case of recapture of ships sold to neutrals after condemnation by a competent tribunal (*a*); or where they have been sold to neutrals before condemnation, but a valid condemnation (*b*), or peace has intervened, before recapture (*c*); or where they have been so sold after confiscation by sovereign authority without a regular condemnation, according to the custom of Moorish states (*d*); or where they have been set forth for war by the enemy: in these cases the former owners have no *jus postliminii*.

The Prize Act was drawn with the intention of expressing the sense and meaning of the law of nations as it at present exists (*e*). It provides, that if any ship, or vessel, or boat, taken as prize, or any goods therein, shall appear and be approved in any Court of Admiralty, having a right to take

(*a*) *The Henrick and Maria*, 4 Rob. 43; *The Comet*, 5 Rob. 285; *The Cornelia*, Edw. 244; *The Purissima Conception*, 6 Rob. 45.

(*b*) *The Falcon*, 6 Rob. 194.

(*c*) *The Schoone Sophie*, 6 Rob. 138.

(*d*) *The Helena*, 4 Rob. 3.

(*e*) *Per Cur.* *The Ceylon*, 1 Dod. 116.

cognizance thereof, to have belonged to any of his Majesty's subjects of Great Britain or Ireland, or of any of the dominions and territories remaining and continuing under his Majesty's protection and obedience, which were before taken or surprised by any of his Majesty's enemies, and at any time afterwards again surprised and retaken by any of his Majesty's ships of war, or any privateer or other ship, vessel, or boat under his Majesty's protection and obedience; that then such ships, vessels, boats, and goods, and every such part and parts thereof as aforesaid formerly belonging to such his Majesty's subjects, shall in all cases (save in such as are hereafter excepted), be adjudged to be restored, and shall be by the decree of the said Court of Admiralty accordingly restored to such former owner or owners, or proprietor or proprietors, he or they paying for and in lieu of salvage (if retaken by any of his Majesty's ships or hired armed ships), one-eighth part of the true value of the ships, vessels, boats, and goods respectively so to be restored, which said salvage of one-eighth shall be answered and paid to the flag officers, captains, officers, seamen, marines, and soldiers in his Majesty's said ship or ships of war, to be divided in such manner as before in this act is directed touching the share of prizes belonging to the flag-officers, &c., where prizes are taken by any of his Majesty's ships of war; and if retaken by any privateer or other ship, vessel, or boat, one-sixth of the true value (*f*).

By the ancient law of Europe, the *perductio infra præsidia*, *infra locum tutum*, was a sufficient conversion of the property; by a later law, a possession of twenty-four hours was sufficient to divest the former owner. This is laid down in the 287th article of the *Consolato del Mare*, in terms not very intelligible in themselves, but which are satisfactorily explained by Grotius and his Commentator Barbeyrac, in his notes upon that article (*g*). Bynkershoek lays it down to the same effect in

(*f*) 45 Geo. 3, c. 72, s. 7.

(*g*) Grot. iii. 6, iii.; Barb. (a), 1 & 7.

these words:—Sane in libro, qui inscribitur *Consulatus Maris*, c. 287, ita, ut modo dicebam, res definita est: nam is, qui navem et onus ab hoste recuperavit, jubetur navem et onus restituere pristino domino, salvo tamen servaticio; idque servatitium, ut justum sit, constituitur pro modo operæ et impensæ in recuperationem factæ, præterit æomni distinctione, quamdiu navis onusque in potestate hostium fuerint. Recte autem ibi additur eam restitutionem duntaxat obtinere, si navis nondum fuerit deducta in locum tutum; sed si in locum tutum, dominio sic plane et plene in hostem translato, navem mercesque deinde recuperatas ex asse recuperatori cedere (*h*). Grotius expresses himself very much to the same effect (*i*); and Loccenius considers this rule as the general law of Europe (*k*). In Lord Stair's decisions, also, the same rule is laid down as the rule of law in Scotland. According to Valin, a similar practice prevailed in France (*l*); and Crompton, in his *Treatise on Courts*, states it as the ancient law of this country, that a possession of twenty-four hours was a sufficient conversion of the property, and that the owner was divested of his property, unless it was reclaimed ante occasum solis. So that according to the ancient law of England, which was in accordance with the ancient law of Europe, there was a total obliteration of the rights of former owners. This rule has since been receded from by this country, when its commerce increased. During the time of the usurpation, when England was becoming commercial, an alteration was effected by the ordinance of 1649, which directed a restitution upon salvage to British subjects; and the same indulgent rule was continued afterwards, when this country became still more commercial; but the common law still prevailed and controlled the provisions of the statute, where the enemy had fitted out the prize

(*h*) Q. J. P. i. 5, p. 202.

(*i*) iii. 6. iii.

(*k*) Locc. de J. M. ii. 4, iv. §§ 4 & 8.

(*l*) Comm. iii. 9, viii. vol. 2, p. 236.

as a ship of war. In the most recent change of the law it is determined, that a vessel belonging to a British subject loses her character on capture by the enemy and conversion into a ship of war (*m*). This country, as a commercial country, has departed from the old law, and has made a new and peculiar law for itself in favour of merchant property recaptured, introducing a policy not then adopted by other countries, and differing from its own ancient practice. A rule of policy so introduced must be considered as an exception from the general law; and is to be interpreted, where any doubt arises, with a leaning to that general law, which is no farther to be departed from, than is expressed. The Prize Act provides, that if such ship or vessel, so taken by his Majesty's enemies, shall appear to have been by them set forth as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors; but shall in all cases, whether retaken by any of his Majesty's ships or by any privateer, be adjudged lawful prize for the benefit of the captors. When the former character of the vessel has been once obliterated by her conversion into a ship of war, the title of the former owner, and his claim to restitution, are extinguished, and cannot be revived by any subsequent variation of the character of the vessel. The words of the act are broad and general, and in a retrospective form. Where a captured vessel had been fitted out and had cruised as a privateer, it was held, that the former owner was not entitled to restitution, though the ship was employed as a merchant vessel, and had no commission of war, when recaptured (*n*). Setting forth does not necessarily mean sending out of port with a regular commission; it is sufficient, if the captured vessel has been used in the operations of war, and constituted a part of the naval or military force of the enemy, by those who had competent authority so to employ her. In the case of the *Castor*, which ship was not carried

(*m*) The *Ceylon*, 1 Dod. 105.

(*n*) *L'Actif*, Edw. 185.

into port, there was no regular commission, for it is not in the power of the admiral to grant a regular commission; he has only an inchoate authority for that purpose, and his acts require confirmation; yet in that case it was held that the ship, though commissioned only by the admiral, was sufficiently clothed with the character of a vessel of war. A commission of war is conclusive of itself as to the character of the vessel; but it by no means follows, that a regular and formal commission is in all cases indispensable. The want of such an instrument may be supplied in various ways by acts equivalent to a commission. Where an armed East Indiaman, captured by an enemy's squadron, had additional guns and a complement of men capable of fighting the ship put on board her, and sailed under an officer having a military commission, and was first engaged in offensive and defensive operations of war, and was afterwards dismantled and used as a prison ship; it was held, that she had been set forth for war(*o*). So where a captured vessel was sent out as a merchant ship with a letter of marque(*p*). So where a vessel captured by an enemy's frigate had a number of men and guns put on board her, and was employed under a commissioned officer in cruising against British vessels(*q*). But the mere act of putting an additional number of men on board an armed prize by the privateer that captured her, without arming or furnishing her with a commission, is not a setting forth to war(*r*). Where a ship has been armed without any authority, that has not of itself been held sufficient to bring the case within the exception of the statute. The Court has never gone so far as to say, that a mere arming will do; the Court has always required some semblance of authority, although it has not thought it necessary to look very minutely into the foundation of that authority. If sailors were

(*o*) The Ceylon, 1 Dod. 105.

(*p*) The Nostra Signora, 2 B. & P. 10.

(*q*) The Georgiana, 1 D.

(*r*) The Horatio, 6 R.

merely to put arms on board a vessel and go out upon a cruise, there would be a deficiency of authority, and the vessel could not be considered as set forth for war according to the true construction of the act of Parliament (*s*).

With these exceptions, the owner of a British vessel is entitled to restitution or recapture; and the recaptors are entitled to salvage. Recapture implies capture, but it is not necessary for that purpose, that the possession of the enemy should be long maintained, nor that it should be a complete and firm possession, which for some purposes is, in contemplation of law, not held to be effected, till the prize is carried *infra præsidia*. The rule of *infra præsidia*, however, is not the rule to be applied to cases of this kind; the clause of the Prize Act alludes to cases of salvage in which no such complete possession is supposed, since it speaks of vessels recaptured and permitted to continue on their original voyage. But in the case of a convoying ship it is not even necessary, that the ship should have been out of sight to found a case of recapture. It will be sufficient, if there has been that complete and absolute possession which supersedes the authority of the convoying ship. Thus, where a vessel under convoy was captured by a privateer, while the convoy was becalmed, and the convoying vessel put out her boats, pursued the privateer, and recaptured the vessel; it was held, that by these acts the former relation subsisting between the vessel and the convoying ship was necessarily superseded. A ship in the possession of the enemy can obey no signal, nor support its former duties and subordination to the convoying ship. There might still remain a duty on the convoying ship to attempt the recapture, as far as it could be done consistently with the safety of the other vessels under her protection. Such a duty would result from the injunctions of the Prize Act, which provides a reward for the recaptor, when the service is effected, and cannot, therefore,

(*s*) *Per Cur.* The Georgiana, 1 Dod. 397.

be intended to preclude the demand of salvage, though the service rendered to the individual by recapture may be no more, than a sense of public duty would otherwise require of him. Under these circumstances, it was held that the conveying ship was entitled to salvage (*t*). Nor is it necessary, to constitute a recapture, that the vessel should have been in the actual possession of the enemy. There have been many instances of capture, where no man has been put on board, as in ships driven on shore or into port. There was a case of a small British vessel armed with two swivels, which took a privateer row-boat from Dunkirk, that had attacked her. The British vessel having only three men on board, and no arms but the swivels, was afraid to board the row-boat, which was full of men armed with muskets and cutlasses; but by the terror of her swivels she compelled their submission, and obliged them to put into the port of Ostend, then the port of an ally, following them all the way at a proper distance. Such a case may not be within the terms of the act of Parliament, which seem to point to a case attended with the circumstances of an actual possession taken. But, if it is not a case of recapture under the act, it is a case of salvage under the general maritime law. Thus where a merchantman, separated from her convoy during a storm, had been brought to by an enemy's lugger, which came up and told the master to stay by her till the storm had abated, when they would send a boat on board, and a British frigate coming up, chased and captured the lugger, and the merchantman made her escape and rejoined the convoy; the frigate was held to be entitled to salvage (*u*). So where a vessel was brought out of a port, which was in the power, though not in the actual occupation of the enemy, and thus rescued from considerable peril (*v*). The abandonment of a vessel by the enemy having possession

(*t*) *The Wight*, 5 Rob. 315.

(*u*) *The Edward and Mary*, 3 Rob. 305.

(*v*) *The Pensamento Feliz*, Edw. 115.



of it, through terror of an approaching force, is sufficient to constitute a case of recapture (*w*). Where a privateer put a prize-master and one seaman on board a neutral vessel having enemy's property on board, and the master voluntarily engaged to carry his vessel into a British port; it was held, that the act of seizure under such circumstances was sufficient to constitute a capture, although the papers were not taken into the immediate possession of the prize-master, and the navigation of the ship was left to the neutral master. The prize-master, having been informed of an intention on the part of the neutral master to carry the vessel into a French port, applied to a king's ship for assistance, and obtained a supply of men, who brought the vessel into Plymouth; it was held, that the king's ship was entitled to salvage (*x*). Where a vessel had been released on bail and the deposit of a sum of money, to answer the adjudication of an enemy's Prize Court; it was held, that she was not in the possession of the enemy, so as to found a claim of recapture upon bringing out of the enemy's port. If the Prize Court condemned, the effect of the sentence would be to confiscate, not the ship, but the sum of money which had been accepted as a substitute; if, on the other hand, the Court restored, neither the ship nor the money could be said to have been in any peril. It was no service to the owners to bring away the ship, which was in no danger, leaving the deposit in the same danger as before. From the moment that bail is accepted, the ship is sacred to the government by which she has been liberated; for it would be monstrous injustice to say, that the ship itself, and that which has been accepted in lieu of it, shall be condemned for the same act (*y*). There is no claim to salvage, where the property rescued was not in the possession of the enemy, or so nearly so as to be certainly and

(*w*) The Charlotte Caroline, 1 Dod. 194.

(*r*) The Resolution, Edw. 13.

(*y*) The Robert Hale, Edw. 265.

inevitably under his grasp. In such cases, the same hazard is incurred, and the same reason exists to hold out a stimulus to recaptors. But the act of rescuing a ship by merely preventing her from going into an enemy's port, will not support a claim of salvage. Such danger is distant and eventual. There is no conflict to be sustained; and salvage might as well be demanded for giving the first information of a war (z). Where, after recapture, a vessel is again captured and condemned, the subsequent act of capture and condemnation works a conversion of the property, and, consequently, a defeasance of the right of the salvors. The right of the recaptors to salvage is extinguished by a regular sentence of condemnation carried into execution, and divesting the owners of their property. But where the sentence of condemnation of the Prize Court is abolished, and the property restored by sovereign authority, the legal fiction of conversion is completely done away by the fact of restitution, and the recaptors are remitted to their right of salvage (a). The Prize Act applies only to goods taken by the enemy as prize, and not to vessels confiscated in time of peace for an alleged violation of the revenue laws. The seizure and condemnation in time of peace work an entire defeasance of British title (b). If an enemy, after capture, should make a donation of the captured vessel to the original owner, that vessel must be condemned as a *droit* or perquisite of Admiralty; and the original proprietor could acquire no interest but as salvor, or from the subsequent liberality of the Crown. In all legal consideration, cases of recapture and donation are precisely the same. They are both equally matter of prize. Donation between enemy and enemy cannot take effect. The character of enemy extinguishes all civil intercourse from which such a title could arise (c).

(z) *The Franklin*, 4 Rob. 147.

(a) *The Charlotte Caroline*, 1 Dod. 192.

(b) *The Jeune Voyageur*, 5 Rob. 1.

(c) *Per Cur.* *The Santa Cruz*, 1 Rob. 75.

Secondly. Of the recapture of property of allies.

The maritime law of England having adopted a most liberal rule of restitution on salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle; in such case it adopts their rule and treats them according to their own measure of justice. This principle was clearly recognised in the case of the *San Jago*. In the discussion of that case, much attention was paid to an opinion formed among the manuscript collections of a very experienced practitioner, Sir Edward Simpson, which records the practice and rule as it was understood to prevail in his time. The rule is, that England restores on salvage to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule. In recaptures, the liberality of this country outsteps its caution; it restores on salvage without inquiry, till it appears that the ally pursues a different rule. Thus, when it appeared that Portugal, before May, 1797, had considered British property recaptured from them liable to confiscation, but an ordinance was promulgated in that month directing the vessels of allies to be restored on salvage, Portuguese vessels recaptured before the date of the ordinance were condemned, and those recaptured after that date were restored on the salvage established by that ordinance (*d*). By treaty between England and Spain, it was agreed, that vessels recaptured should be restored on salvage, unless they had been fitted out as vessels of war (*e*).

Thirdly. Of the recapture of neutral property.

When the property of neutrals is liable to be condemned by the Prize Courts of the captor's country for breach of blockade or other unneutral conduct, which renders it liable to be treated as the property of enemies in the particular transaction, the

(*d*) The *Santa Cruz*, 1 Rob. 49.

(*e*) The *San Francisco*, Edw. 279.

same service is rendered by recaptors, and they have the same claim to salvage, as on the recapture of the property of an ally (*f*). The property of neutrals in such circumstances, is, by intendment of law, the property of enemies for the purpose of capture (*g*). Thus, salvage was decreed on the recapture of neutral property on board an enemy's ship of war (*h*).

But neutral property recaptured is not subject to salvage by the general rule on this subject, founded upon the supposition, that justice would have been done if the vessel had been carried into the port of the enemy; and that, if any injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country, to whose cognizance the case would have been regularly submitted. This is a presumption, which is to be entertained in favour of every state, which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place, if states hold out decrees of condemnation, however unjust, on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution (*i*). A Spanish vessel bound from Monte Video to London, was recaptured from a French privateer after recapture from a British privateer. No edict was produced from the French code to shew, that the vessel would have been subject to condemnation by the Prize Courts of France, merely because it had come out of the hands of a British privateer, or because the original voyage had been from a Spanish colony to London. Salvage was pronounced not to be due (*k*). So, where a neutral vessel bound to a belligerent port with a cargo on account of a neutral government for the supply of its squadron,

(*f*) Val. Tr. vi. 1, §§ 11, 12.

(*g*) Val. Tr. vi. 1, § 11; The Elsebe, 5 Rob. 176.

(*h*) The Fanny, 1 Dod. 443.

(*i*) The Huntress, 6 Rob. 104; The Sansom, 6 Rob. 410; The War Onskar, 2 Rob. 299; The Eleonora Catharina, 4 Rob. 156.

(*k*) The Carlotta, 5 Rob. 54.

cruising for the protection of its trade against the corsairs of Barbary, was recaptured (*l*). But salvage was decreed on recapture of a neutral vessel bound to a neutral port without certificates of origin on board, there being presumptive evidence, that the vessel would have been liable to condemnation on this ground under the French decrees in the Prize Courts of the captor (*m*). So, where the vessel recaptured would have been liable to be condemned under the French decrees prohibiting neutral trade with Great Britain (*n*).

Fourthly. As to the persons who are entitled to salvage on recapture. The Prize Act applies to conjoint operations of the army and navy, though it only mentions recaptures by ships and boats, and not such as are effected by the assistance of land forces. The act, though it only mentions the usual mode of recapture at sea, does not mean to exclude other modes of recapture. The essential facts must be the same, and no difference can exist, but in such circumstances, as are perfectly immaterial to the merits of the transaction. In some clauses of the act, distinctions are made as to conjoint operations for the benefit of the joint captors, in order to settle their respective interests, and not to change the nature of the capture in favour of the former proprietors. But even if such a case did not fall within the act of Parliament, it must come under the old rule of the law of nations, by which the rights of the owner would be completely devested. Where an island was taken by a joint naval and military force, the ships recaptured were held liable to be adjudged under the provisions of the act (*o*). A land force may be entitled to sustain a claim of salvage for the recapture of vessels in a maritime port, without the co-operation of a naval force, where the recapture is a necessary and immediate result of a military operation directed to the

(*l*) *The Huntress*, 6 Rob. 104.

(*m*) *The Acteon*, Edw. 254.

(*n*) *The Sanson*, 6 Rob. 410.

(*o*) *The Ceylon*, 1 Dod. 116, 119.

capture of the place, within whose port the property is lying. Thus, where the re-occupation of Oporto was the immediate object of military operations, and the consequence of a battle fought in the neighbourhood by the allied army under the Duke of Wellington, and the delivery of the recaptured British vessels was an effect of the re-occupation of the town; the army was held to be entitled to salvage. It was held, that this claim of salvage would attach upon property landed and warehoused by the enemy, where it remained to be reclaimed by the owners on the recapture of the place, and was resumed and returned on board as parts of the cargoes of the vessels. But it was held, that no salvage was due on the Portuguese vessels recaptured at the same time. A native army is not entitled to salvage for rescuing a sea port town of its own country from the possession of the enemy. And, on the same principle, an allied army co-operating with a native army is not entitled to it. The native army employed by the state, and paid by the state for the national defence, if its efforts were successful, would be the means of reinstating the sovereign in his rights of sovereignty, and his subjects would be entitled to receive their property back as it stood before the irruption of the enemy. The whole would revert instantly to the former owners, and though the gratitude of individuals might induce them to offer something as a voluntary gift to the army, by whose exertions they had been so extensively benefited, yet there is nothing in the nature of the service, that could sustain a claim of salvage. This position is fortified by the general practice of mankind, and the general practice of mankind forms one great branch of the law of nations. The history of the world has produced no instance in which a claim of salvage for the rescue of a capital city by the native army has been made and allowed; and, therefore, on principle and on practice, the claim is not sustainable. That is the state of the transaction in its simplest form. But suppose allies to be co-operating with the native army in the recapture; in that case, the army coming as allies,

and associated with the native army compose part of the same body; they are pursuing the same objects, and stand in every respect on the same footing; they would have the same rights and no more, and the proportion of force can make no difference. The whole together must be considered as one army in every respect, where native property is concerned, and if the native army would not be entitled to salvage, the army of the allies can claim none. It may be thought, to militate against this principle, that salvage was pronounced to be due on British property recaptured at Oporto by the allied army of Great Britain and Portugal. But there is this material distinction, that the liberation of British property was not the immediate object for which the British force was sent to Portugal, and the recovery of it by the British army was a mere casualty, and therefore it is subject to the same claim for salvage as British property recaptured elsewhere by a British force (*p*). Agreeably to the same distinction, it has been held, that a man-of-war was not entitled to salvage for rescuing a hired transport associated with her in the performance of a particular service. It might as well be claimed where one of his Majesty's ships receives assistance from another in battle. The admission of such a principle would have the effect of converting every engagement into a struggle for salvage, and must be attended with incalculable mischief to the public service (*q*).

Upon principle, persons not in any military capacity, but merely acting as private individuals, if they happened by any successful effort to rescue property from the enemy, would be entitled to salvage (*r*). A noncommissioned vessel is fully competent to assert an interest in salvage. This is fully confirmed by the words of the Prize Act, s. 39, which direct salvage to be paid on recapture by his Majesty's ships of war,

(*p*) The Progress, Edw. 210.

(*q*) The Belle, Edw. 66.

(*r*) *Per C'ur*. The Progress, Edw. 214.

or any privateer or other ship, or vessel, or boat, under his Majesty's protection and obedience (*r*). Where an English ship, with a French cargo on board, was recaptured by non-commissioned persons, the Court decreed one-sixth salvage, and the whole cargo, being of small amount, to be given to the recaptors (*s*). So in the case of rescue (*t*). In another case, a third was given. The master and crew of a noncommissioned vessel are in strict language the only salvors. The owners have in general no claim, and come in only under the equitable consideration of the Court for damage or risk, which their property might have incurred (*u*).

In estimating the value of property for the purpose of salvage, the valuation is to be made upon an estimate of the actual value of the property at the place of restitution, and not at the place of recapture. The value at the place of restitution is to be understood with reference to the moment of arrival in port; for the recaptors have no right to a salvage on any additional value, which the cargo may acquire by the payment of duties and other incidental expenses incurred afterwards. Where recaptors permit the masters of the recaptured vessels to take possession of them at the place of recapture, that is only a provisional restitution, subject to all rights and upon an implied understanding, that the valuation shall be afterwards determined; the actual and legal restitution is that which the Court makes when it pronounces in favour of claim, after the property has been brought in for adjudication (*v*). Where vessels that had been chartered in this country under an agreement to proceed to Oporto in ballast, were there captured and recaptured, and in the consequence of the recapture were enabled to carry that purpose into effect; it was held, that

(*r*) *The Urania*, 5 Rob. 148.

(*s*) *The Fortuna*, 4 Rob. 78.

(*t*) *The Beaver*, 3 Rob. 292.

(*u*) *The San Bernardo*, 1 Rob. 178.

(*v*) *The Progress*, Edw. 222.



salvage was due upon the freight. The service rendered to vessels so circumstanced put them in a condition to recover their whole freights, which depended entirely on their final arrival here. As to the freights of vessels taken up at Oporto, no salvage could be due, as the voyage had not commenced. But the vessels, which had gone from this country under a charter-party for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture (*w*). Property on which a commission of appraisement has issued, having been ordered to be returned on bail to answer salvage, is in the custody of the Court until the commission is executed. Where such property was accidentally destroyed by fire before valuation, it was held, that the loss must fall upon both parties in the proportion of their several interests (*x*). In fixing a proportion of the value for salvage in cases not determined by the Prize Act, the Court is in the habit of giving a smaller proportion where the property is large, and a larger proportion where the property is small; and for this obvious reason, that in property of small value a small proportion would not hold out a sufficient encouragement, whereas in cases of considerable value a smaller proportion would offer no inadequate compensation (*y*). The act of Parliament contemplating military salvage, only gives to the recaptors the same rate of reward, whether the service has been easily effected or not; whether the enemy abandoned the property without a contest, or whether the recapture of it was attended with dangers, or even with the loss of part of the crew. It may, however, happen, that a ship may be rescued, not only from the hands of the enemy, but likewise from the dangers of the sea; and thus a civil may be combined with a military salvage. Under such circumstances, more particularly in cases where, supposing no

(*w*) The Progress, Edw. 223.

(*x*) The Three Friends, 4 Rob. 368.

(*y*) The Blendenhall, 1 Dod. 421.

military salvage to be due, a claim for civil salvage alone might with justice have been made, the Court has thought itself at liberty to go beyond the proportion limited by the act of Parliament, and to give an additional reward to the salvors as for a separate service (*z*). The recapture of an enemy's vessel from under a battery is within the act, which does not authorize any distinctions as to the place of recapture, or the degree of gallantry with which the service may have been performed (*a*). Store ships recapturing British property, are entitled only to the lower rate of salvage limited by the act. There is a clear distinction between store ships and revenue cutters. Revenue cutters are not on the military but the fiscal establishment of the state, and if they are entitled to make recaptures from the enemy, it is only by virtue of their letters of marque, by taking which they acknowledge themselves to be private ships of war. Store ships are armed at the public expense, are commanded by commissioned officers, are rated as ships of war, and, bearing that character, are entitled to make captures on their own account. Their primary business is the conveyance of stores, but they are not prohibited from taking prizes. They must be considered as forming part of the military establishment of the country, and entitled only to the lower salvage of one-eighth (*b*). Where the enemy voluntarily abandoned a prize, finding that he could not carry her into port, took out the master and crew, and proceeded in chase of another vessel that was in sight, and the vessel was found derelict and brought into port by a king's ship; it was held, that the case was not within the restrictions of the Prize Act, and one moiety was allowed as salvage (*c*). In a case of little merit, only one-sixth was given (*d*). Where British seamen working their way home in a foreign vessel,

(*z*) *The Louisa*, 1 Dod. 317.

(*a*) *The Apollo*, 3 Rob. 308.

(*b*) *The Sedulous*, 1 Dod. 253.

(*c*) *The Lord Nelson*, Edw. 79; *The Gage*, 6 Rob. 273.

(*d*) *The John and Jane*, 4 Rob. 216.

assisted in recapturing the vessel from the enemy, salvage was decreed on the property brought into a British port. Every person assisting in a rescue has a lien on the thing saved. He has, as it has been argued, an action in personam also; but his first and his proper remedy is in rem; and his having the one is no argument against his title to the other. In this case it was held, that the British seamen returning to their own country without any engagement or intention to go back to America, and without having any domicile there, were not at all in the condition of American subjects, and could not have been so considered in this transaction, even if hired as mariners on board the American vessel; for it was no part of their duty as seamen to attempt a recapture, and they would not have been guilty of a desertion of their duty if they had declined it. It is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary. There is no rule prescribed in the English law applying to cases of foreign property rescued. In cases of rescue between English subjects, the Court usually adopts the proportion of recapture, but it is not bound to do so; and in respect to foreigners, there is no rule beyond that which subjects such matters to a sound discretion, distributing the reward according to the value of the services that have been performed (c). But salvage is not due to the crew for rescuing their ship from mutineers. This case is extremely different from that of rescue from an enemy, because there, the moment the capture is effected, the crew are discharged from their duty to their employers. The contract between the parties is at an end. The seamen no longer constitute the crew of the vessel, but become prisoners of war. Not so in the case of mutiny, for that does not discharge them from their duty to their owners, whose property they are bound, if possible, to recover; not that

(c) *The Two Friends*, 1 Rob. 271.

they are called upon to sacrifice their lives wantonly and to no purpose, but bound to use their best endeavours wherever there is a reasonable prospect of success. A service of this kind does not go beyond the limits of that duty, which they are bound to perform in virtue of the engagement which they have contracted with their owners, and does not found any claim to salvage (*f*). Where a British ship was recaptured with a cargo, the property of an allied sovereign and his subjects, the property of the allied sovereign was restored without payment of salvage or expenses, and the property of his subjects on payment of expenses without salvage (*g*). Where a year and a day have elapsed since capture, and no claim has actually been advanced, the question of property is precluded against the former owner, who must be taken to have abandoned his property (*h*).

A claim of salvage, not within the operation of the Prize Act, may be forfeited by the misconduct of salvors (*i*). Persons dispossessing original salvors without reasonable cause, are wrong doers, and shall take no advantage of their own wrong. The exertions they may use in bringing in the ship and cargo, shall enure, not to their own profit, but to the profit of those who would otherwise have performed the service (*k*). Where a captured vessel is rescued by her crew, or recaptured by the enemy, the interest of the captor is divested; and if it be captured a second time, the second captor is entitled to the whole benefit of the prize (*l*).

(*f*) The Governor Raffles, 2 Dod. 14.

(*g*) The Alexander, 2 Dod. 37.

(*h*) *Per Cur.* The Henric and Maria, 4 Rob. 44.

(*i*) The Barbara, 3 Rob. 171.

(*k*) The Blendenhall, 1 Dod. 418.

(*l*) The Polly and The Marguerite, 4 Rob. 217, (*a*); Val. Comm. iii. 9. vol. ii. p. 237.—Tr. vi. 1, § 14.

## CHAPTER IX.

## OF PRIZE.

THE subject of prize may be considered in respect of the rights, first, of the Crown. Secondly, of the Lord High Admiral. Thirdly, of actual captors. And fourthly, of constructive captors.

First, of the rights of the Crown. All prize property, which is not granted to the Lord High Admiral or to the captors, is vested in the Crown. Any mode of forcible detainer or occupancy prior to hostilities is sufficient to vest the rights of the Crown. Thus, where Dutch ships were seized in British ports in anticipation of war, and promises of restitution were held out on certain terms; on the declaration of hostilities that ensued, these seizures were enforced with a retrospective operation on all who had not complied with the terms, and the property so seized was finally condemned as prize to the Crown. So, where Dutch vessels were seized at the Cape of Good Hope under similar circumstances (*a*). So, where a prize is condemned in consequence of the inadmissibility of a British owner to claim property engaged in an illegal course of trade, condemnation passes to the Crown (*b*). So, where after a capitulation money was paid for the redemption of vessels not protected thereby, condemnation passed to the Crown. Capitulations are certainly of the nature of ransoms, but admitting of very favourable distinctions. Ransoms have

(*a*) The *Gertruyda*, 2 Rob. 211.

(*b*) The *Etrusco*, *Lords*, 4 Rob. 262, (*n*).

been forbidden, except under circumstances of necessity, as subject to great abuse. Capitulations in their nature can scarcely become liable to the same objection, they being contracts between the commander and the conquered state; on the contrary, they have always been favourably supported, and it is of great importance to the general interests of the captured that they should be sustained (*c*). Where public property was seized on the land by a privateer, after the capitulation of an island to a king's ships upon articles, which provided that all public property should be at the disposal of the captors, it was condemned to the Crown conformably to the terms of the capitulation. The articles referred to the public character in which the captors professed to treat, and not to the assumption of any right to dispose of the public property on their own private account. It passed into the possession of the captors for the purpose of being brought to adjudication, subject to the legal considerations applying to such property under our own internal regulations. If the property was fraudulently withheld, it ought to have been taken possession of for the Crown of Great Britain, and the private captors ought not to have attempted to appropriate it to themselves by setting up a title of their own. The only proper course was to take possession as salvor for the Crown, and to notify the circumstance (*d*).

The interest in all prizes taken by custom-house or excise vessels commissioned with letters of marque, was reserved to the Crown by the ninth section of the Prize Act, 45 Geo. 3, c. 75. That section provides, "that nothing in this act contained shall extend or be construed to extend to entitle any person or persons to any interest in such ships or vessels, goods or merchandizes, as may be captured by any private ships or vessels of war belonging to his Majesty's Commissioners of Customs or Excise; but that the same ships or

(*c*) Case of ships taken at Genoa, 4 Rob. 388.

(*d*) The Thorshaven, Edw. 102.

vessels, goods or merchandizes so captured shall belong to his Majesty, and be applied and disposed of in such manner as his Majesty under his sign manual shall order and direct, after legal adjudication thereof." The reason for the introduction of this clause was, that these vessels used occasionally, in former wars, to provide themselves with letters of marque at their own expense. This was found, in some degree, inconvenient to the proper service in which they were employed by government. Instead of looking after petty smugglers under their public commission, they were looking after rich vessels of the enemy under their letter of marque; which entitled them to the whole benefit of such prizes, though they had been fitted out, manned and armed, not at the expense of the owners but at the expense of the government, which was thus to a certain degree defrauded of their proper services. On the breaking out of war it was deemed advisable to annoy the enemy's commerce upon their own coasts, and to intercept the return of their vessels into their own ports; and it was thought that these vessels were eminently qualified for this service from their intimate acquaintance with the coasts of France, and their experience in that navigation. The government therefore directed them to be provided with letters of marque, for the purpose of enabling them to act hostilely in the service required; but at the same time to prevent their acting without control, and with injury to their other public duty, reserved the distribution of all prizes taken by these vessels to its own discretion. Besides these purposes of public policy, which this arrangement answered, it had the additional advantage of providing a sort of general fund, out of which government might reward, at its discretion, such of them as had cruised with merit, but without success (*e*). The 20th section of the same act provides, that in case any ship or vessel, or any goods or merchandize shall be taken or retaken, and restored by the commander or other person having the

(*e*) *The Helen*, 3 Rob. 224.

charge or command of any privateer, or other ship, vessel or boat under his Majesty's protection and obedience clandestinely, or by collusion or connivance, or by consent (unless the same shall be allowed and approved of by the Court of Admiralty) of such commander or other person, without being brought to adjudication, the ship or vessel, and goods and merchandize so taken or retaken and restored, and also the ship's tackle, furniture, apparel, arms and ammunition shall, upon proof thereof to be made in any Court of Admiralty having legal cognizance thereof, be declared and adjudged to be good prize to his Majesty; and any bond given by any captain or commander of such vessel or boat shall be, and is hereby declared to be forfeited to his Majesty: and in case any such ship or vessel, or any goods or merchandize as aforesaid shall be taken or retaken, and restored by any commander, captain or other officer having the command of any ship or vessel belonging to his Majesty clandestinely, &c., such commander, captain or other officer shall forfeit the sum of one thousand pounds; and the said goods, &c., shall be and are hereby directed to be adjudged in all Courts of Admiralty having legal cognizance thereof, as good prize to his Majesty: provided, Section XXI, that if a ship be retaken before she has been carried into an enemy's port it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, &c.

Section XXX. That if any commander or commanders, officers, seamen, marines, soldiers or others shall break bulk on board (except in case of necessity, to be allowed by the Court of Admiralty), or embezzle any of the money, jewels, plate, goods, merchandize, tackle, furniture or apparel of or belonging to any prize or prizes, such commander, &c., shall for every such offence forfeit his whole share in such prize to his Majesty, for the use of the Royal Hospital at Greenwich, and so to be adjudged on proof thereof by the Court of Admiralty in which such proof shall be made, and shall also forfeit treble the value of all such money, &c.



Section XXXII. That it shall be lawful for the Judge of the High Court of Admiralty, or the Judge of any other Court lawfully commissioned to take cognizance of prize upon due notice of the breach of any of his Majesty's instructions relating to prizes, or of any offence against the law of nations committed by the captors in relation to any prize, or to the persons taken on board the same, to condemn the prize to his Majesty's use and disposal, save as is hereinbefore directed with respect to breaking of bulk or embezzlement; and when the prize has been taken by a ship having a commission or letter of marque to revoke the same, and to pronounce the bond to be forfeited, and to compel payment of the penalty secured thereby, subject nevertheless to an appeal to the Lords Commissioners of Appeal in prize causes.

Section XXIII. provides, that if any captain or other commander of any of his Majesty's ships or vessels of war, or hired armed vessels in his Majesty's service, having transports, or merchant ships, or vessels under convoy, shall wilfully desert or sail away from them in pursuit of, and with the view of capturing any ship or vessel of the enemy, (other than ships or vessels armed or fitted for war only, and which shall be seen hovering about, or bearing down upon such convoy), or, having captured a prize, shall wilfully desert his convoy for the purpose of carrying his prize into port; or if the commander of any ship or vessel whatsoever, having his Majesty's despatches on board, shall sail out of his proper course in pursuit of, and with the view of making prize of any ship or vessel of the enemy, and shall be duly convicted thereof by sentence of a court martial, such commander shall forfeit the share of all and every such prize to his Majesty for the use of Greenwich Hospital.

The Crown has the power at any time before adjudication, to release captured property without the consent of the captors. Prize is altogether the creation of the Crown. No man has, or can have any interest, but what he takes as the

mere gift of the Crown. Beyond the extent of that he has nothing. This is the principle of law on the subject and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisition of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance, for the purposes of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject: *Res publica cedunt reipublicæ*. It is not to be supposed that the attribute of sovereignty is conferred without reason; it is given to that power, to whom it belongs to decide on peace or war, and may use it in the most beneficial manner for the purpose of both. A general presumption arising from these considerations is, that government does not mean to divest itself of the universal attribute of sovereignty, conferred for such purposes unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption, must be taken the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules, than those which are applied in the construction of the grants of individuals. Against an individual it is presumed, that he meant to confer a benefit with the utmost liberality that his words will bear. It is indifferent to the public, in which person an interest remains, whether in the grantor, or the taker. With regard to the grant of the sovereign, it is far otherwise. It is not held by the sovereign himself as private property, and alienation shall be presumed, except what is clearly and indisputably expressed. With these rules of interpretation, the title deeds of the captors must be considered, to determine whether the Crown has, in these deeds, renounced that power which, in principle it possesses, and in practice, has frequently exercised. If there is any thing that can be supposed to produce that effect, it must be the conveyance of a right in some species or other to other persons, and these can be

other than the captors, in virtue of which they claim an indefeasible interest in prize once taken. Their claim rests wholly on the order in council, the proclamation, and the Prize Act. Independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest, as in point of authority. The right generally given to seize, and bring to adjudication all ships of the enemy, does not bind the Crown so as to bar it from any further exercise of its power with respect to seizures; for after that right is given to seize all ships of the enemy, the Crown can exempt as it sees fit. The Crown, which declares general hostilities, can limit their operation: it can except individuals: it grants particular passes: it exempts particular classes of the enemy's ships, notwithstanding the right thus given to seize all ships. The right of seizing all ships, thus generally given, does not bind the Crown in its power of qualifying that right by subsequent modifications; nor can the exercise of its power with respect to proceeding to adjudication, be barred by the mere act of seizure. The mere act of seizure is an act in itself, in some degree, always dubious till adjudication, and possibly erroneous; and this dubious act cannot convey to the party an indefeasible right to proceed to adjudication, when the very proceeding may be a further wrong done, an aggravation of costs and damages already occasioned by an improper seizure. The right supposed to be conferred on the captors by the act of seizure, the right of bringing to adjudication, is conveyed only in the order of council. It is not given in the proclamation or Prize Act. It is indeed recited in both, as a thing otherwise existing, but it makes no part of the powers conferred by either of these instruments. 'This *jus persequendi*, as it is called, is not a right conveyed, but a duty enjoined. Captors have generally a right to seize, subject to this duty of bringing to adjudication; a duty enjoined, that they may not make seizures, without bringing the ships and goods seized, to the notice of the proper tribunal, in order to

prevent the right of seizure from degenerating into piratical rapine. If the Crown imposes that obligation, the Crown can release it. Supposing the proclamation and Prize Act to be out of the way, and that the matter stood singly upon the order of council, there can be no doubt, that the Crown could so release. The Crown imposed the obligation, and so far as the order of council alone is concerned, the Crown retains the whole interest. If the prize is condemned, it must be condemned to the Crown, and for its interest; for the order of council gives no interest to captors. No doubt could exist, supposing the matter to stand on the order of council alone, that the Crown is completely *dominus litis*, and also *dominus rei litigatæ*, supposing there is no claim maintainable on the part of any neutral proprietor. As far as any right to bar the power of the Crown to release can be supposed to be vested in the captor, it must be attributed to some enlargement of the rights given by the order of council, derived from the Prize Act and proclamation. The proclamation gives the whole property, but not till after adjudication; until that time, no beneficial interest attaches. So the Prize Act, in like manner, gives the whole interest or property, in opposition to that proportioned and partial interest given by former acts, but not till adjudication. In adverting to these instruments, it is impossible not to remark the very guarded terms, in which the benefit is conferred. The proclamation gives to privateers after final adjudication, and not before, not merely after adjudication; but superadding a negative pregnant, and not before. With regard to king's ships, the grant is expressed with similar caution; it gives the neat produce of all such prizes taken, the right whereof is inherent in us and our Crown. And again, it directs, that such prize may be lawfully sold or disposed of by them or their agents, after the same shall have been to us finally adjudged lawful prize, and not otherwise. These guarded expressions are not used for the purpose of protecting the interests of the claimant till after

adjudication. The Crown cannot be supposed to be anxious to make a reservation or exception of that, which, without any such exception, would be perfectly safe; for no interest of the Crown, or its grantee, could divest the interest of the claimant. The reservation must, *ex necessitate rei*, *ex defectu alicujus alterius materiæ*, apply to rights over which the Crown has a dominion; and which, unless reserved, it might be supposed to have granted. These rights are, the right of controlling the whole proceedings till final adjudication; the right of declaring that the party shall not be further proceeded against as an enemy; the right of suspending hostility against him, with regard to property which has been seized under the general order of reprisals. For such purposes, and for such purposes only, it must be, that the Crown has declared, that till after adjudication, the captor has no interest which the Court can properly notice for any legal effect whatsoever. In the case of captures made by the king's own ships, the authority of the Crown is most marked upon the face, and in the substance of every part of the proceedings, in the most emphatical manner. The Crown officers are the prosecutors in the name of the Crown: the final adjudication under the very terms of the act is a condemnation to the Crown; and most clearly, the interest would rest in the Crown under that condemnation, if the act had not expressly superadded, that it should accrue to the benefit of the captor. In seizures made by private ships of war, the hand of the sovereign authority is less visible in the mode and style of proceeding; but the right of the Crown is sufficiently guarded by the repeated declarations, that the interest shall vest in such captors after adjudication, and not before. The practice has been unquestioned, for the Crown to direct the release of ships before final adjudication. The instances indeed are not very numerous, because it is not to be supposed, that the occasions for the exercise of such an act of authority would be very frequent. Such instances will appear less numerous,

because the fact, that they have been so released, is not necessarily, nor very distinctly entered in the books. All that appears is, that the proctor, then proceeding for the Crown, as he must do, declares that he proceeds no further; on which the Court issues an order of restitution, as a matter of course and of necessity; for no party can interpose and pray a condemnation to the Crown; when the Crown has declared, that it prays no such thing, but consents to the restitution. If it were otherwise, it would be in the power of every man who has made a capture, of the pettiest commander, of the pettiest privateer, to force on, in spite of all the prudence of the Crown opposed to such an attempt, the discussion and decision of the most delicate questions; the discussion and decision of which might involve the country in the most ruinous hostilities (*f*). But the release and order of restitution founded thereon are defeated, if the release be not accepted by the claimant. It is undoubtedly competent to the claimant to refuse the restitution as defective, and to go to the Court to obtain a more ample compensation. If he appeal from the government to the Court of legal redress, the Court must receive the complaint, and proceed to an ultimate determination on the quantum of grievance alleged; and by such conduct, a party might fairly be considered to have waived the benefit of the release. After the acceptance of such an extrajudicial release, the claimant would no longer be competent to proceed against the captor; the act of acceptance would be considered as a waiver of his judicial remedy, as a total release on the one side and on the other; for nothing could be more unjust, than to leave the captor at the mercy of the claimant for costs and damages, by taking from him the power of justifying the seizure, by proceeding to adjudication (*g*).

Secondly, Of the rights of the Lord High Admiral. All rights of prize belong originally to the Crown, and the bene-

(*f*) *The Elsebe*, 5 Rob. 173.

(*g*) *Per Cur.* *ibid.*

ficial interest derived to others can proceed only from the grant of the Crown. It was thought expedient to grant a portion of those rights to maintain the dignity of the Lord High Admiral. The rights of the Lord High Admiral, or, as in modern times it is more usually expressed, of the king in his office of admiralty representing that great officer, are parts of the ancient rights of the Crown communicated by former grants, under a very different state and administration of his office, from that which now exists in practice. All grants from the Crown are to be construed strictly against the grantee contrary to the usual policy of the law in the consideration of grants; and upon this ground, that the prerogatives and rights and emoluments of the Crown, being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away. Naval captors are grantees also under the proclamation and the Prize Acts. But there is an essential distinction between their claims and those of the Lord High Admiral. The grant to the Lord High Admiral, whatever it conveys, carries with it a total and perpetual alienation of the rights of the Crown. They are gone for ever, and separated from the Crown, and nothing short of an act of Parliament can restore them: whereas the grant to captors is nothing more than the mere temporary transfer of a beneficial interest. The Crown would not be chargeable with the violation of any public law, if it did not issue the grant, and though the practice of issuing it after the commencement of every war has been so constant in later times as to authorize the expectation of its continuance, it still is to be considered as the occasional act of the Crown's bounty, by which not the right but the mere beneficial interest of prize is conveyed for a time; but to return to the Crown, and there to remain, till again conveyed by a fresh act of royal liberality. Against such captors standing on an interest

of that species, the construction is the same as it would be against the Crown itself; because they cannot be pronounced against without pronouncing, in effect, that a perpetual alienation of the Crown's right to prize taken under such circumstances has already been made to the Lord High Admiral. From the tenor of the order of council of 1665, issued to ascertain the rights of the Lord High Admiral, it appears that the distinction between the rights of the Admiral and the rights of the Crown is founded in this; that when vessels come in, not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crew, or from being forced or driven in by king's ships, they belong to the Crown. This is the broad distinction, which is laid down in the order of council, and which since has been invariably observed(*h*). This order provides, that all ships and goods belonging to enemies coming into any port, creek, or road of this his Majesty's kingdom of England or Ireland (by subsequent orders extended to all the dominions of the Crown) by stress of weather, or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced into port by the king's men-of-war; and also such ships as shall be seized in any of the ports, creeks, or roads of this kingdom or of Ireland before any declaration of war or reprisals by his Majesty, do belong to his Majesty(*i*). Usage has construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions there-

(*h*) The *Maria Françoise*, 6 Rob. 282; The *Rebeckah*, 1 Rob. 227.

(*i*) 1 Rob. 230, (*n*).



unto belonging (*k*). The grant from the Crown to the Lord High Admiral applies to the king's dominions generally, and there is nothing that points to a distinction between those parts of the king's dominions, over which the Crown has plenum dominium, or otherwise. No point is more clearly settled in the Courts of common law, than that a conquered country forms immediately part of the king's dominions. Hence, where a ship came into the roadstead of an island that had surrendered to the British forces, and was there seized, the ship was condemned as droits of Admiralty (*l*). It has been held, that the word roads means a known general station for ships notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself. The very expression coming into a road shews, that by road is meant something much beyond mere anchorage ground on an open coast. When it was laid down in the *Trantmansdorff*, that it was not necessary that the ship should be actually entered, and that it was enough if she was in *ipsis facibus* of the port, creek, or road, it is evident that the words ports, creeks, or roads have a signification intimating certain known receptacles of ships more or less protected by points and headlands, and marked out by limits, and resorted to as places of safety. Where a ship about to enter a road was captured by a force taken from the crews of king's ships, which was stationed on a small island which had been fortified with guns taken from the ships; it was held, first, that the time of capture is to be dated, not from the actual possession, but from the striking of the colours, when that formal act of submission has not been defeated; and that as she had not entered the road, but was only about to enter it, and was under sail when she struck her colours, the claim of the Lord High Admiral could not be sustained, as the point at which the Admiralty right com-

(*k*) *The Rebeckah*, 1 Rob. 232.

(*l*) *The Foltina*, 1 Dod. 450.

mences is when the ship is actually entering the road. Secondly, it was held, that though a capture at sea made by a force upon the land is considered generally as a non-commissioned capture, and enures to the Lord High Admiral, this capture was not to be considered in that light. All title to sea prize must be derived from commissions under the Admiralty; and a military force upon the land is not invested with any commission so derived impressing upon them a maritime character, and authorizing them to take for their own benefit. But this was the case of a mere naval station, used for the temporary accommodation of the crews of ships of war. There was not a person upon it that was not borne upon the ship's books. The block-houses which they had constructed were mounted with their own ships' guns, with the addition of a few spare guns otherwise procured. The whole force was entirely subservient to their ships, and for their use, and for no other purpose. The character of the place distinguished it most materially from a land fortress possessed by a military garrison. The prize was condemned to the captors (*m*). With respect to captures in roads generally it must be understood, that a road must at least be so connected with the common uses of the port, as to constitute a part of the port in which the capture is alleged to have been made. There are roads along many parts of the coasts of this kingdom, which make no part of any port. The port of Yarmouth is very different from the roads of Yarmouth; and no case is to be found in which a ship lying merely at anchor in a road, without being protected by points of land, has been held to support a claim of droits on the part of the Admiralty. It is not enough that ships should anchor there for a short stay. It must be the place, in which vessels not only arrive, but take up their station for the purpose of unlivering their cargoes in the ordinary course of commerce (*n*). When a

(*m*) The *Rebeckah*, 1 Rob. 227.

(*n*) *Per Cur.* The *Maria Françoise*, 6 Rob. 300.

ship was brought in upon conjecture of war, when hostilities existed, but were not certainly known, and was therefore released, but was seized again when the existence of hostilities was no longer a matter of conjecture; it was held, that the case was not only not within the words of the grant to the Lord High Admiral, but was that which was specially reserved to the Crown, and consequently that condemnation ought to pass to the captor (*o*). Where a neutral vessel was seized in a British port by order of the governor, and condemned for contraband, it was condemned as a *droit of Admiralty* (*p*). So, where boxes of tin plates for canister shot were put on board a cartel ship by a British subject, and were seized in the port of Dover (*q*). But where a vessel was boarded *animo capiendi* outside a harbour by the boat of a king's ship lying in the harbour; it was held, that the capture was made out of the harbour, and the claim of the Admiralty was rejected (*r*).

The Order of Council in 1665 further declares, that all enemies' ships and goods casually met at sea, and seized by any vessels not commissioned, do belong to the Lord High Admiral (*s*). Where a capture is made by a vessel commissioned with a letter of marque, when the master is not on board, the legal interest in the capture will not enure to the private captors under their commission, but it must be condemned as a *droit of Admiralty* taken by non-commissioned captors (*t*). Where the master of a fishing smack brought into a British port a neutral ship in distress with an enemy's cargo, left one of his men on board to keep possession, stationed his own vessel near to keep guard, and gave information that

(*o*) The *Maria Françoise*, 6 Rob. 282.

(*p*) The *Richmond*, 5 Rob. 325.

(*q*) The *Rosine*, 2 Rob. 372.

(*r*) The *Odin*, 4 Rob. 322, (*u*).

(*s*) 1 Rob. 231, (*n*).

(*t*) The *Charlotte*, 5 Rob. 280; The *Robert*, 3 Rob. 194, as explained in The *Helen*, 3 Rob. 224.

he had seized a droit of Admiralty, the capture was held to be complete; and the claim of a revenue cutter, which had seized the ship after she was brought in, was dismissed (*u*). Where a capture was made by a cutter, which had been hired by the captain of a king's ship at his own expense, and stored and manned from his ship; it was held, that the capture was not made by persons legally commissioned to take for their own benefit, and consequently the prize was condemned as a droit of Admiralty. Commanding officers of his Majesty's ships may have a right to put their men, arms and stores on board another vessel. There may be circumstances that may render it fit, in many instances, that such a discretion should be exercised, subject to the responsibility that always attends them in the discharge of their public duty. But by so doing an officer cannot entitle that other vessel to be reckoned among the description of vessels to which the interest in prize is given by the proclamation and the Prize Act. If a capture is made by a tender attached by the interposition of public authority; on every principle on which a capture by a boat would entitle its ship, a capture made by a tender specially employed in that capture by the ship of war to which she belongs, might perhaps entitle the ship. But this was not a tender attached by any interposition of public authority, but by the private act of the officer hiring and manning her himself (*v*). Where a prize is jointly captured by commissioned and non-commissioned captors, such part of the prize as the non-commissioned captor would have been entitled to if commissioned, is condemned as a droit of Admiralty (*w*). The reward of non-commissioned captors is left to the liberality of the Admiralty, and is often referred to the Admiralty Court. In a case of non-commissioned capture of great merit, when

(*u*) *The Amor Parentum*, 1 Rob. 303.

(*v*) *The Melomane*, 5 Rob. 41.

(*w*) *The Twee Gesuster*, 2 Rob. 284, (*n*); *The Le Franc*, *ibid.* 285, (*n*).

the reward of the captors was so referred, the Court awarded the whole proceeds, one-third to the owners of the vessel, and two-thirds to the crew, to be divided according to the usual proportions in private ships of war (*x*).

Thirdly, Of actual captors. It is the common practice of European states, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their Prize Acts (*y*). Though the grant of prize is in terms a grant of the property of the king's enemies, it is not restricted to the property of nations with whom we are at war. It is held, in construction and practice, to embrace all property liable to be condemned as prize, and not particularly reserved to the Crown or to the Admiralty. By fiction, or rather by intendment of law, all property condemned is the property of enemies; that is, of persons so to be considered in the particular transaction; and half the business of the Prize Court is exercised on such property, in determining whether it is liable to be condemned as prize to the captors. It is not therefore a position seriously to be maintained, that the captor's grant does not reach to this extent by the constant course of interpretation authorizing such a construction (*z*). The last Prize Act, 45 Geo. 3, c. 72, provides, Section II., that the flag officers, commanders, and other officers, seamen, marines, and soldiers on board any ship or vessel of war in his Majesty's pay, shall have the whole interest and property of and in all and every ship, vessel, goods and merchandize in the Orders of Council described, which they have taken, &c., or shall take during the continuance of the present war, after the same shall have been adjudged lawful prize to his Majesty in any of his Majesty's

(*x*) The Haase, 1 Rob. 286.

(*y*) *Per Cur.* The Santa Cruz, 1 Rob. 61.

(*z*) The Elsebe, 5 Rob. 176.

Courts of Admiralty or Vice-Admiralty in any of his Majesty's dominions, which shall be duly authorized to take cognizance of such captures, to be divided in such proportions and in such manner as his Majesty hath by his proclamation ordered, or shall think fit to order and direct by proclamation to be issued for those purposes: and the commanders, officers, seamen, marines, and soldiers on board his Majesty's hired armed ships shall have such interest in all ships and goods which they have taken, &c., or shall take during the present war, &c.

Section III. That the flag officers, commanders and other officers, seamen, marines, and soldiers on board every ship and vessel of war in his Majesty's pay, being armed, officered and employed in his Majesty's service, who shall take any fortress upon the land, or any arms, ammunition, stores of war, goods, merchandizes, and treasure belonging to the state, or to any public trading company of the enemies of the Crown of Great Britain upon the land; or any ship, vessel, or merchandize laden on board the same, in any creek, river, haven, or road belonging to and defended by the said fortress upon the land, shall have the sole interest and property of and in all and every such ship or ships, vessel or vessels, arms, ammunition, stores of war, goods, merchandize, and treasure, after final adjudication thereof, as lawful prize in any of his Majesty's Courts of Admiralty or Vice-Admiralty duly authorized as aforesaid (which Courts are hereby required to proceed thereon, as in other cases of prize), to be distributed by his Majesty in such proportions and manner as hereinbefore is mentioned: provided always nevertheless, that in conjunct expeditions of the navy and army against any such fortress upon the land in which his Majesty shall have been pleased to give any instructions or directions for the division and distribution of property taken thereat, the flag and general officers and commanders, and other officers, seamen, marines and soldiers acting in such conjunct expeditions, shall have such proportional interest and property as his Majesty, under

his sign manual, shall think fit to order, &c.: provided, Section IV., that if no instruction shall have been given by his Majesty, it shall be lawful for the respective commanders-in-chief of the fleet and of the army employed, to make agreements in writing for the division of the ships, goods and merchandizes to be taken between the said fleet and army, which agreements being approved and confirmed by his Majesty shall be binding upon all persons; and the share assigned to the fleet by such agreement shall be distributed therein according to his Majesty's proclamation; and the share assigned to the army shall be distributed among the officers and soldiers in the proportions correspondent thereto: provided nevertheless, that the interest and property hereby given to the army employed in such conjunct expedition shall not extend, nor be deemed or construed to extend to entitle the said army to share in the distribution of any ships or vessels, goods, merchandize, or effects captured in the voyage to or from such fortress.

Section IX. provides, that prize taken by any private ship or vessel having commission, or letter of marque, after final adjudication as lawful prize, shall wholly and entirely belong to and be divided between and among the owner or owners of such ship or vessel, and the several persons who shall be on board the same, and be aiding and assisting in the taking thereof, in such shares and proportions as shall be agreed on with the owner or owners of such ship or vessel, as shall be the captor thereof, their agents or factors, as the proper goods and chattels of such owner or owners, and the persons who shall be entitled thereto by virtue of such agreements among themselves.

The commissions of privateers do not extend to the capture of private property on land; that is a right, which is not granted even to king's ships. The words of the third section of the Prize Act extend only to the capture by any of his Majesty's ships of any fortress upon the land, or any arms,

ammunition, stores of war, goods, merchandizes, and treasure belonging to the state, or to any public trading company of the enemies of the Crown of Great Britain upon the land. Here then the interests of the king's cruisers are expressly limited with respect to the property in which the captors can acquire any interest of their own, the state still reserving to itself all private property; in order that no temptation might be held out for unauthorized expeditions against the subjects of the enemy on land. With regard to private ships of war, the Lords of the Admiralty are empowered by the ninth section to issue letters of marque to the commanders of any such ships, or vessels, for the attacking and taking any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods, or merchandize belonging to or possessed by any of his Majesty's enemies in any sea, creek, river, or haven. It was the intention of those who brought this bill into Parliament, that privateers should not be allowed to make depredations upon the coasts of the enemy for the purpose of plundering private individuals, for which reason they were restricted to fortified places and fortresses, and to property water-borne (*a*). The act of Parliament gives the whole interest and property in all prizes which they may take to the flag officers, commanders, and other officers, seamen, marines, and soldiers on board any ship or vessel of war in his Majesty's pay; and perhaps the term soldiers, standing as a component part of the text in this clause of the act, may mean such military persons as may happen to be doing duty on board as marines. But the statute directs distribution to be made according to the king's proclamation; and the proclamation, according to ancient usage, gives a share to all marines and other soldiers, and all other persons doing duty and assisting on board. This must be held to include all supernumeraries and passengers, since every person is presumed to be willing and able to give assistance, if required so to do;

(*a*) The Thorshaven, Edw. 102.



and the presumption with respect to soldiers is particularly strong. The maritime crew is usually lessened, when soldiers are sent on board any of his Majesty's ships, and they are considered persons capable of affording assistance in a variety of ways. The right of soldiers to share in all prizes, at the capture of which they may have been present, has been invariably admitted in the Admiralty Court, and the same doctrine has been held in the Court of King's Bench. In the case of *Wemys and Linzee*, which was twice tried in that Court, the right of passengers to share was treated as a matter always acquiesced in; but it was ruled that they took as supernumeraries only, and ranked in the lowest class of distribution. It is clear, therefore, that soldiers on board a capturing ship have, generally speaking, a right to prize money; and it was held, that this right extended even to invalided soldiers. Though invalided they are still fit for some duty, even upon land; though disabled from field service, and the more active operations of war, they are still useful for the purposes of defence, and upon that account form part of the usual military force of every country. On board ships of war they may certainly be very serviceable during an engagement; and according to the ancient practice of the service, and the true construction of the Prize Act and proclamation, invalid soldiers are entitled to share in the proceeds of a prize taken by the vessel on board which they were embarked (*b*). Where a lieutenant going to join his own ship did duty as a lieutenant on board a frigate, in which he had obtained a passage; it was held, that he was not entitled to a lieutenant's share in a prize made by the frigate, while he was so doing duty. The proclamation and the Prize Act lay down two requisites as necessary to entitle a person to share; that the officer shall be not only on board, but that he shall be also an officer belonging to the ship. This is the obvious and also the decided meaning of the clause; and Lord Mansfield, in *Wemys and Linzee*, states it

(*b*) *The Alert*, 1 Dod. 236.

to have been judicially determined, that the officers must not only be on board, but belonging to the ship(c). In the case of the *Cabadonga*; it was held, that the crew of the *Gloucester* were not entitled to share according to their respective ranks with the crew of the *Centurion*, when an engagement had been sustained, attended with great personal danger, and the crews had been incorporated, and had long been associated in a common service. Lord Anson on his return voyage, having the *Centurion* and *Gloucester* with him, found it advisable to sink the *Gloucester*, and to take her crew and officers on board the *Centurion*. The *Centurion* having her full number of officers, the officers of the *Gloucester* were entered on the supernumerary list, and did duty according to their respective ranks, and took part in the engagement, when the prize was taken. The Court of Admiralty pronounced them to be entitled to share according to their respective ranks; but this judgment was reversed by the Lords of Appeal; who held that they were only entitled to share in the fifth class, not being officers of or belonging to the *Centurion* at the time of the capture(d). The captain of a ship being sent by the admiral on a cruise; when he was out of sight of the fleet, appointed the claimant to be acting lieutenant on board his ship. The captain on his return to the fleet reported his act to the admiral, who expressed some approbation of what had been done, but did not confirm the appointment, and immediately removed the claimant to his own ship. It was held, that the claimant was not entitled to share as a lieutenant in prizes taken by the ship while he was so acting on board. It may be necessary that captains or senior officers entirely detached and independent of a superior command, should be entrusted with the power of making appointments; but in this case the ship, though separated from the fleet, was not sepa-

(c) *The Nostra Signora del Carmen*, 6 Rob. 302.

(d) *Wemys v. Linzee*, 1 Doug. 326; *Nostra Signora del Carmen*, 6 Rob. 305, (n).

rated from the command of the admiral in any manner, or to any legal effect whatever (*e*).

Where an admiral sent two of the ships of his fleet on a cruise, and being seized with a paralytic stroke, sailed for England, handing over his general instructions, together with minute and particular orders, such as he could not be entitled to give but as commander of the station, to the senior officer, whom he directed to take the command during his absence, and struck his flag on his arrival in England; it was held, that he was entitled to the flag share of a prize, made by one of the ships after he had quitted the station, but before he had struck his flag (*f*). The proclamation of the late war directs, that when an inferior flag officer is sent out to reinforce a superior officer, the superior flag officer shall have no right to any share of prizes taken by the inferior flag officer, before the inferior flag officer shall arrive within the limits of the command of the superior flag officer, and actually receive some order from him. It is not necessary, that the word reinforce should be used; it is sufficient if an inferior officer is directed to put himself under the command of his superior, for the purposes of general co-operation. The mere arrival, however, alone, is not sufficient; another requisite circumstance is, that he should have received some orders from the commander on the station. The terms of the proclamation are very general, "some orders;" but there must be some, by which the authority of the commander-in-chief over this particular part of his force is shewn to be vested in him. It is true, that besides the general purpose of reinforcing, the inferior officer may have a distinct and separate service confided to him by the Admiralty, which, though to be performed within the limits of the station, may not be connected with the general

(*e*) The *Nostra Signora del Coro*, 6 Rob. 305.

(*f*) The *St. Anne*, 3 Rob. 60. But the proclamation of 1808 provides, that a chief flag officer, quitting a station to return home, shall have no share of prizes taken by the ships left behind, after he shall have passed the limits of the station, in the event of his leaving the command without being superseded. See Appendix.

purposes for which the commander of the station is employed. This is a possible thing; but it would require a strong case to shew that a distinct and separate service ~~was~~ intended; the presumption being, that where a service is to be performed within the limits of a station, it is coincident with the general services on which the commander-in-chief is employed, usually with a very large discretion, as to the means of annoying the enemy with the best effect. Orders were given to Sir James Saumarez to invigorate the blockade of Cadiz, which Lord Keith's force was then keeping up. Sir James Saumarez came within the limits of the station, heard of an enemy's squadron in Algesira's bay, and attacked them, but unsuccessfully; and went to Gibraltar to refit, which was the principal port of the station, and might be called almost the head quarters of the commander-in-chief. When there he received orders, which had been opened by his predecessor, and were general orders, applying in part to the blockade of Cadiz, and not confined to the first officer that might arrive, but extending to all in succession, who might put themselves under Lord Keith's command. It was said, that Sir James Saumarez had not read these orders; but the Court would not admit an inferior officer to aver that he had not read orders that were directed and delivered to him from his superior. Under these circumstances it was held, that Lord Keith was entitled to his flag share of a prize that had escaped from the blockading force, and had been captured by the ships under Sir James Saumarez (*g*). So, where the captain of a ship, sent home to refit by the admiral commander-in-chief in the Downs, received secret orders from the Admiralty, for service to be performed off Dunkirk, within the limits of that station, communicated with the admiral upon the subject, and returned to his former command off Dunkirk, by the admiral's express orders; and after a correspondence between the Board of Admiralty and the admiral on the subject, the service was performed, and in the course

of it a prize was captured by a ship put under the captain's command by the admiral (*h*). But it is otherwise when a captain of a ship, under an admiral's command, is employed by another competent authority, and still more by a paramount authority, on a distinct and separate service; although that service, may, in its nature, be very short, and the party be directed, immediately after the performance of it, to revert to his former relation of subjection. It must be a separate service; because it would be too much to say, that there may not be services so coincident as not to affect the relation. There may be duties which can hardly be considered as obstructing the execution of the original duties; mere incidents and nothing more. It may be extremely difficult to distinguish in particular cases, whether the new services are merely of this incidental nature. It may not be easy to lay down any general criterion, that may be sufficient for all cases, in a matter, which in the nature of it, admits of very thin partitions; of very nice and slender gradations. The safe ground would be, if the new service imposed was of such a kind as necessarily to carry the party out of the direction, and in a contrary direction to that in which the original service would have engaged him. If the service carries him merely on his road, it may be too much to say, that this is to be deemed a separate service; but if it be that which by necessity carries him, or by probability may carry him elsewhere, it has something of the character of a separate service. Thus, when a ship, sent from the Irish station to Portsmouth, to refit and return without loss of time, received orders from the Admiralty to return to Cork, taking a short range to fall in with the homeward bound ships, and to afford any protection, which they might stand in need of; it was held, that in sailing under these orders, the conduct of the captain was no longer under the immediate direction of the admiral of the Irish station; for it was to depend entirely upon circumstances, whether it might

(*h*) The *Desiree*, 4 Rob. 422.

not be the very reverse of what the admiral had commanded. If the captain of the ship fell in with vessels, some of them in a disabled state, or received intelligence of privateers hovering about them, they might want protection up to their ports, and it was his duty under these orders to give it. Captures were made by the ship on ground which belonged equally to the Irish station, and to other stations, while cruising under these orders which were, in the event, actually inconsistent with those of the admiral; and it was held, that they were made under the orders of the Admiralty, not confirmatory of, or coincident with the orders of the admiral; but suspending and annulling those orders for the time, and producing capture, which would not otherwise have occurred; and the Court pronounced against the admiral's claim to the flag share (*i*).

If one party seizes a vessel, and afterwards abandons her, and then another takes the same vessel, the last seizor is in law the only captor. The commander alone is responsible in costs and damages, and his act is binding on the interests of all under him. He has a right to examine the ship's papers, and to detain or not according to his own notions of propriety. He may, perhaps, act erroneously, and relinquish what would have been good prize to himself and his crew. But if he does dismiss what he had before seized upon, the interest of himself and all under him is concluded by his act, and the same vessel lies open to seizure by any other captor who may exercise a sounder discretion (*k*).

A privateer sailing under convoy of a king's ship is precluded, by the 25th Section of the Prize Act, from sharing in any prize taken by the ship or by the privateer itself, unless such privateer shall have received orders from the convoying ship to chase, or otherwise act hostilely against the enemy, and shall have been actually aiding and assisting in such captures.

(*i*) The *Orion*, 4 Rob. 362.

(*k*) The *Diligentia*, 1 Dod. 404.

By the 5th Section of the same act it is enacted, as a further encouragement to the officers, seamen, marines, soldiers, and others on board his Majesty's ships of war, as also of privateers, to attack any ships of war or privateers belonging to the enemy, that there shall be paid by the treasurer of his Majesty's navy unto the officers, seamen, marines, soldiers and others, who shall have been actually on board any of his Majesty's ships of war, or hired armed vessels, or of any privateer at the actual taking, sinking, burning, or otherwise destroying any ship or ships of war, or privateers belonging to the enemy during the present war, 5*l*. for every man who was living on board any ship or vessel so taken, &c. at the beginning of the attack or engagement between them; the numbers of such men to be proved by the oath of three or more of the chief officers or men who were belonging to the said ship, &c., or belonging to any of them at the time of her or their being taken as prize, sunk, &c., or in case so many as three shall not survive the engagement, upon the oath of such of them as shall survive before the mayor, &c. of the port within any of his Majesty's dominions, or before the British consul or vice consul residing at any neutral port to which such prize or officers or men shall be brought, &c.: provided always, that where such oath of the number of men on board any ship or ships so taken, &c. cannot be had by reason of the total destruction of the officers and crew of such ship or ships; then the number of men on board such ship at the beginning of the attack or engagement shall be ascertained by such evidence as under the circumstances of the case, shall by the Judge of the High Court of Admiralty, or by the Judge of any Court duly authorized, be deemed sufficient thereof: provided likewise, that in any cases where doubts shall arise, whether the party or parties claiming head-money are entitled thereto, the same shall be summarily determined by the Judge of the High Court of Admiralty, or by the Judge of any other Court of Admiralty in which

the prize shall have been adjudged, subject nevertheless to an appeal to the Lords Commissioners of Appeal in prize causes.

The subject of head-money has undergone some variations. Originally it was the reward of actual combat only. In later times the necessity of actual combat has been dispensed with; and capture itself, whether produced by actual combat or not, has been held a sufficient foundation for the claim. But there is no case in which head-money has been granted, where the act of capture has not been consummated. In all cases a successful consummation of the engagement is required: and if it does happen that other vessels come in at a later hour, all that the Court can do is to confirm the capture as one common act; and, looking to its commencement, its progress, and its final accomplishment to hold that all parties are entitled. In the case of the *Clorinde*, after an engagement in which the *Eurotas* had all her masts shot away, the two ships separated without a surrender on either side; the *Eurotas* being so crippled as to be unable to keep within gun-shot. By noon the next day she was ready for action, and was coming up fast; but the *Dryad* hove in sight of the *Clorinde*, commenced a chase, and came up, and after firing a few shot took possession of her, while the *Eurotas* was four miles off. The Court rejected the exclusive claim of the *Eurotas* for head-money, but pronounced for her interest in conjunction with that of the *Dryad*, inasmuch as by her conflict immediately preceding she was entitled to be considered as a joint taker<sup>(1)</sup>. Head-money is the peculiar and appropriate reward of immediate personal exertion, and consequently wherever any claim to participate in a bounty so appropriated has been advanced, it has always been considered in a more rigid manner by the Courts, than those which arise out of the general interests of prize. The claim of ships to share in the head-money with the actual captors on the principle of associated service, has

(1) The *Clorinde*, 1 Dod. 436.



been decided in many ancient cases: in the case of the *Superbe*, in the case of the *Duchess Anne*, and in the case of the *Toulouse*, in which it appears that the prize was condemned to one man-of-war as actual captor, and to two others as assisting in the capture; but the bounty-money was ordered to be paid only to the actual captor, the others not being actually engaged with the prize. This is the invariable rule, which for more than a century has been applied to cases of this description. The mere endeavour to come up and close with the enemy either before or during the battle, will not sustain a claim to participate in the head-money; unless the effort is successful, the endeavour to do the act does not constitute the act itself, so far as the claim of head-money is concerned. Some ships may also use laudable endeavours to render assistance after the battle, by helping to remove the prisoners, and doing other acts of an useful nature; but that is not joining in the battle, and will not bring them within the principle. It being the established principle that head-money belongs to the taker, the Court will not recede from that principle upon behalf of an asserted interest of joint capture, upon any state of facts that does not clearly and out of all question support that claim. When the question of fact or law in support of such an interest is dubious, the Court will incline to the clear and incontestable interest of the actual taker, and will not be disposed to diminish, by an enlarged construction, the benefits which the law has exclusively appropriated to him (m). Association in chase furnishes no claim to head-money without an association in combat or capture; the principle of constructive assistance does not extend to head-money. This was decided by the Lords in the case of *L'Hercule*, in which it was held, that where the chase had been seen by the whole squadron, even the ships detached by signal were not entitled to share in the bounty or head-money with the actual captor, though in sight at the time of the

(m) *La Gloire*, Edw. 280.

capture (*n*). In the case of ships claiming to share in bounty-money arising out of a general engagement, there can be no selection of combatants. It is a service in which all equally participate; the whole fleet is supposed to be engaged with the whole of the opposing force. It is often so in the reality of fact, and always so in the supposition of law; and therefore all are equally admitted to partake in the benefit of prize and head-money (*o*). But the Court has gone still further, and has pronounced for the interest of a vessel, which was not shewn with any degree of certainty to have arrived within gun-shot. Such was the case of the *Weser*; in which the *Weser*, having been for some time engaged in action with two other vessels, on the appearance of the *Rippon* surrendered at once; and, although there was no further action, the immediate submission was held to entitle the *Rippon* to share in the head-money. So, where the enemy's fleet was destroyed by fireships, which formed part of a blockading fleet, and were despatched by the commander-in-chief on that service; it was held, that the rest of the fleet was entitled to share in the head-money, although it never approached within gun-shot of the scene of action (*p*). This case is supported by no authority but that of the *Rippon*, and the rule which it lays down seems to require re-consideration; for it extends to constructive assailants, by an arbitrary interpretation of the statute, that bounty, which the plain sense of the words of the act, in their grammatical meaning, appears to confine to those whose personal efforts are exerted in an actual attack, which results in the actual taking, burning, sinking, or otherwise destroying any ships of war or privateers belonging to the enemy.

Where a capture can be considered as a continuation of a general action, the whole fleet would be equally entitled to head-money, notwithstanding the formal surrender .

(*n*) *L'Alerte*, 6 Rob. 238.

(*o*) *Per Cur.* *La Gloire*, Edw. 282.

(*p*) *The Ville de Varsovie*, 2 Dod. 301.

to one particular ship belonging to the fleet. But it is otherwise where the capture is not the immediate consequence of the general action. Where a ship which had formed part of the combined fleet at Trafalgar, and had escaped into port, from which she was sent out to assist vessels in distress, was captured by the *Donegal*, which had been detached by Lord Nelson before the engagement commenced, and did not join Lord Collingwood till the day after the battle: it was held, that those two circumstances completely destroyed all supposition as to the continuity of the engagement. Neither the capturing nor the captured vessel could be identified with the respective fleets, between which the engagement had taken place; and upon this ground the Court pronounced against the claim of the fleet to share in the head-money. In the same case the Court pronounced against the claim of the *Leviathan*, which in making a signal to another vessel fired a shot, which fell between the *Donegal* and the *El Rayo*; but without any intention of compelling the surrender of the *El Rayo*, or of producing any effect by intimidation; her whole and undivided attention being directed to another object (*q*). Where a prize was recaptured, and again taken and condemned to the second taker; it was held that head-money was due to the original captor notwithstanding the recapture (*r*). Where an enemy's ship was run aground and destroyed; it was held, that head-money was due for men escaping on shore, who were on board at the commencement of the engagement (*s*). But head-money is not due for British prisoners on board the prize (*t*). Head-money is not due, where the ship is neither taken nor destroyed. When a king's ship had driven an enemy's frigate on shore, and attempted to destroy her without success, but had left her in such a disabled state, that the

(*q*) *The El Rayo*, 1 Dod. 42.

(*r*) *The Matilda*, 1 Dod. 367.

(*s*) *The Babillion*, Edw. 39.

(*t*) *The San Joseph*, 6 Rob. 331.

enemy were under the necessity of breaking her up. It was held, that head-money was not due (*u*). But where an enemy's ship was set fire to by her crew, and totally destroyed, on the approach of the force coming to attack her; head-money was pronounced to be due (*v*). Head-money is not due for the capture of armed vessels, that are not commissioned (*w*). With respect to vessels having cargoes on board, a distinction has been recognised; and it has been held, that head-money is due for the capture of men-of-war having cargoes on board, but not for the capture of privateers under the same circumstances. But this distinction was upheld by the Court against its own judgment; in deference to precedents, which seem to have no foundation in reason, or in the words of the act, which provides head-money as a reward for the actual taking, &c. of any ship of war or privateer belonging to the enemy without distinction (*x*). An equally absurd distinction prevailed formerly as to captors. A merchant vessel furnished with a letter of marque is manifestly a ship of war, and is not otherwise to be considered, because she acts also in a commercial capacity. The mercantile character being superadded does not predominate over or take away the other. There was formerly indeed a distinction made between privateers and merchant vessels furnished with a letter of marque; but that distinction has since been entirely done away (*y*). Head-money is not due on ships captured by the joint forces of the army and navy in harbours, rivers, and other such places, as are objects of joint attack in conjunct expeditions (*z*).

Fourthly, of constructive captors.

(*u*) *L'Elise*, 1 Dod. 442.

(*v*) *The Uranie*, 2 Dod. 172.

(*w*) *The Dutch Schuyts*, 6 Rob. 48.

(*x*) *La Francha*, 1 Rob. 157; *The Santa Brigada*, 3 Rob. 58; *The Hirondeila*, 3 Rob. 57.

(*y*) *Per Cur.* *The Fanny*, 1 Dod. 448.

(*z*) *La Bellone*, 2 Dod. 343.

The act of Parliament and the proclamation give the benefit of prize to the takers, by which term are naturally to be understood, those who actually take possession, or those affording an actual contribution of endeavour to that event. Either of these persons are naturally included under the denomination of takers; but the Courts of law have gone further, and have extended the term "taker" to another description of persons; to those, who not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy. Capture has therefore been divided into capture *de facto*, and capture by construction. But the construction must be such, as the Courts of law have already recognised, and not a new unauthorized construction; for, as the word has already travelled a considerable way beyond the meaning of the act of Parliament, the disposition of the Court will lean not to extend it further, but to narrow it and to bring it nearer to the terms of the act than has been done in some former cases. The case of the *Mars* is a strong authority on this point, in which the claim of joint capture was disallowed to ships not in company, but stationed at different outlets to catch the enemy, who were known to be under the necessity of passing through one of them; and in that case it was intimated to be the opinion of the Judges of the common law, that the Court ought to conform more strictly to the words of the act of Parliament. In all cases the *onus probandi* lies on those setting up the construction, because they are not persons strictly within the words of the act, but let in only by the interpretation of those acting under a competent authority to interpret it. It lies with the claimants in joint capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or to shew some principle in their favour so clearly recognised and established, as to have become almost a first principle in cases of this nature. The being in sight, generally, and with some few exceptions, has

time as fast as possible to support them. The chasing vessels took the two ships first appearing, and also a third, on which the dispute arose. There was much contrariety of evidence, whether the fleet, which was continuing to sail in the same direction, was not up and in sight; and the chief doubt arose, owing to the night coming on; for if it had been day, the fleet would clearly have been in sight; and it was at all events well known to be at hand, and ready to give any support that might be wanting. Under these circumstances the Court of Appeal affirmed the sentence of the Court below, pronouncing for joint capture (*b*). Different principles apply in cases, when ships are associated by public authority on a common service, and where they are not so associated together. In the latter case, when a capture is made by ships not associated by public authority for a common service, it could not be maintained on any principle, that the mere circumstance of being within such a distance, as would bring them within sight in clear weather, would entitle them to share, when, in fact, they were not seen at all. It would put this rule upon a very uncertain footing, unconnected with all rational principle, as well as incapable of all satisfactory proof, if the Court had to determine on the state of the atmosphere, and on the loose conjectural evidence that might be applied to ascertain such a state. It is essentially necessary in such cases, that the claimant should have been in sight at some part of the transaction, though it is not required that it should be at the moment of capture, because the impulse and impression on the mind of the enemy, who is to be intimidated, or of the friend who is to be encouraged, may remain, notwithstanding a headland or fog, and may therefore bring it within that principle of law, upon which constructive assistance is built. But in cases of ships associated together by public authority, the same principle does not necessarily apply. If one ship of a squadron takes a prize in the night unknown to the rest, it would

(*b*) *Lords*, 1784, cited *Per Cur.* 2 Rob. 25.

been agreed on, were held entitled to share. It was not necessary in this case to determine whether they would have been entitled, if they had arrived after the terms had been settled, but before the articles, had been formally executed (*e*). So where smaller ships of a blockading squadron were sent nearer in shore than the larger vessels could safely venture, with orders to bring up all vessels attempting to break the blockade. In such case there is no separation of service to break the connexion of the squadron so as to destroy their mutual and common interest. Such a service is not merely connected with the blockade, but is the blockade itself, which the squadron was sent to form; the smaller ships, which draw less water, forming the interior tier, and the ships of the line the outer; and though possibly out of sight on that account, yet all employed in one common undistinguishable service, having no object immediate or remote, but the enforcement of the blockade (*f*). So where a prize, coming out of a blockaded port, is taken by one of the ships of a blockading squadron stationed off the mouth of the harbour, while the rest of the squadron, maintaining the blockade, are stationed at some distance (*g*). In the case of the *Guillaume Tell*, a squadron was stationed to watch the harbour of La Vallette, from which the prize, an enemy's ship of war, was attempting to make her escape. The prize and another man-of-war were known to be blocked up in the harbour, and the ships of the squadron were ordered to be on the look out; the proper signals to be used in case the blockaded ships should attempt to escape were communicated, and a general order was given, that in whichever quarter the attempt might be made a sufficient number of the contiguous ships should pursue. The prize was pursued and taken by a part of the squadron; the signal rockets and the flashes of their guns were seen by part of the ships that

(*e*) The *Island of Trinidad*, 5 Rob. 92.

(*f*) The *Harmonie*, 3 Rob. 318.

(*g*) The *La Henriette*, 2 Dod. 96.

remained stationary. It was held, that in case of chasing by a fleet, the animus persequendi in all is sufficiently sustained by the act of those particular ships that do pursue: that it is not necessary that the whole squadron should pursue, and that the other ships which remained stationary off La Vallette were entitled to share. Secondly, it was held, that the claim of particular ships forming part of the squadron would not be excluded by a physical impossibility of active co-operation arising from the state of the wind. There have been cases in which it has been determined that physical impossibilities of some permanence, and which could not be removed in time, would have such an effect; as, for instance, in the case of a ship lying in harbour totally unrigged, which has been held to be as much excluded as one totally unconscious of the transaction; because by no possibility could that ship be enabled to co-operate in time. But a circumstance so local and transitory as the state of the wind, forms no ground of exclusion. The interests of joint captors would be placed on a very precarious footing, if a doctrine were to be admitted which referred to the legal operation of a casualty so variable in itself, and so little capable of being accurately estimated. It being proved in this case that the whole fleet were acting with one common consent in a preconcerted plan for the capture of this prize, it was held to be as much a chasing under orders as if it had taken place in the open sea (*h*). In the case of the *Empress*, the actual captor, the *Rover*, a sloop of war, exchanged signals with another ship of war, which proved to be the *Beaver*, under the command of a senior officer, and in chase of the same vessel. The captain of the *Rover* afterwards discovering the prize, applied by signal to his senior officer to know whether he should continue in chase of the first vessel, or go in chase of the other, and received the answer, "I think you had better go after the other;" he thereupon bore up in chase of the prize, which he captured

(*h*) The *Guillaume Tell*, Edw. 6.



about twelve o'clock at night. The Beagle continued in chase of the first vessel until she lost sight of the Rover and the prize. By the rules of the navy a junior officer coming in sight of a senior immediately becomes subject to his command, and must obey him without any previous order from the Admiralty to that effect; and it can make no difference whether the orders of a superior officer are conveyed in civil or in peremptory terms. The two ships therefore were engaged in a joint enterprise, acting under the orders of the same superior officer. They had associated for the purpose of capturing both vessels, and the prize was taken by the Rover in consequence of directions given by the senior officer commanding the Beagle, and a distribution of the force pursuant to those directions. The Beagle was held entitled to share (i). If two vessels are associated for one common purpose, the continuance of chase is sufficient to give the right of joint capture. Sight under such circumstances is by no means necessary; because exclusive of that there exists that which is of the very essence of the claim, encouragement to the friend, and intimidation to the enemy. When two vessels join in chase under orders received by signal from a superior officer, they are to be considered as consorts; not indeed precisely to the same extent as if they had been associated by an order from the Board of Admiralty, but for the particular business in which they are acting under orders so given, and for the purpose of any capture arising out of it (k). Where a squadron was employed in blockading certain ships of war in the bay of Naples, and a summons to surrender was sent in; it was held, that the blockade commenced not from the time when the summons was sent in, but from the moment that the ships were assembled long before to stop the egress of the vessels; and that a ship forming part of the squadron, and present after they were so assembled, was entitled to share as joint

(i) The Empress, 1 Dod. 368.

(k) L'Etoile, 2 Dod. 106.

captor, though she was afterwards detached, and did not return till after the surrender (*l*). So, where a ship was under the orders of the commander-in-chief of the force, by part of which an attack was made on Savona, and was lying in sight of the scene of action, and communicating information to the commander-in-chief by signal; it was held, that she was entitled to share in the capture (*m*). So, where soldiers were landed from the fleet to cut off the communication between the enemy's fleet and its own coast, that was held to be a case of preconcert and co-operation of the most effectual kind; and though possession was taken by the fleet, the military forces were held to be entitled to share as joint captors (*n*). By the general practice of the navy, prize interests acquired by a prize-master on board a captured vessel, enure to the benefit of the whole ship's company. The rule has not been recognised or established by the decrees of the Court of Admiralty, but has prevailed without judicial authority, on the general notion which has been entertained of the intrinsic equity of such a communication of interest. With respect to privateers, the shares of different persons concerned are regulated by articles of agreement; and when those articles are not literally applicable to the circumstances of the capture, their place must be supplied by the principles of natural equity and reason. Hence, when by articles it was provided, "that those embarked on board prizes, and made prisoners, or shipwrecked, shall share in every thing made by the privateer in their absence:" it was held, that these articles implied a reciprocal benefit to the crew left on board the privateer, and they were entitled to share with their prize crew put on board a captured vessel (*o*). So a king's ship, though not in sight, is entitled to share as joint captor in prizes made by a tender

(*l*) The Naples Grant, 2 Dod. 273.

(*m*) Genoa and Savona, 2 Dod. 88.

(*n*) The Hoogkarspee, Lords, 1786, cited *Per Cur.*, 2 Rob. 76.

(*o*) The Frederick and Maryanne, 6 Rob. 213.

attached to her by orders of the Admiralty, and acting under her command (*p*). But it is otherwise, where the tender is not so attached (*q*), and where a prize was made by part of a fleet stationed off Cadiz, not for the purpose of preventing the egress of merchant vessels, but to watch the enemy's fleet, which was then in a state of preparation for sea: it was held, that the rest of the fleet were not entitled to share, when the prize was condemned as enemy's property, and the capture did not involve any question of breach of blockade, and, consequently, was not within the purpose for which they were associated (*r*). In the case of the *Genereux*, a ship, which was captured on the coast of Sicily, at a distance of twenty leagues from Malta, by ships forming part of a squadron stationed to watch the harbour of La Vallette, which were sent to look out for her, while the rest kept their station, though the firing of the guns was heard by one of the stationed ships: it was held, that the rest of the fleet were not entitled to share (*s*). Where two vessels, that formed part of a squadron, had been separated, one by stress of weather, and the other in chase of a privateer: it was held, that the occasion on which they had separated being not subservient to the general design, they were not entitled to share in a capture at which they were not present (*t*).

Where a number of East India ships not commissioned against the Dutch, were employed as transports to convey reinforcements to the British army at the Cape of Good Hope, and by their appearance off the coast disconcerted an attack which the enemy were about to commence upon the army, and employed their boats in carrying provisions and military stores on shore, and in landing the troops; and drafted volun-

(*p*) The *Anna Maria*, 3 Rob. 211.

(*q*) The *Charlotte*, 5 Rob. 280.

(*r*) The *Nordstern*, Lords, 1809, cited *Per Cur. Edw.* 126.

(*s*) The *Genereux*, Lords, 1803, cited *Per Cur. Edw.* 16.

(*t*) The *Island of Trinidad*, 5 Rob. 92.

teers from each to draw the artillery, &c., and to serve on board one of the ships, which was employed to act under military orders; and were allowed by the courtesy of the commander-in-chief of the fleet to hoist their pennants, which they had taken down out of respect to the king's ships; it was held, that with the exception of the ship employed under military orders, they were not entitled to share as joint captors. Though commissioned against the French, they had no commission against the enemy, who was the particular object of this expedition; and therefore, whatever their force might be, they could not be considered as more than transport vessels liable, as all British vessels are liable, on extraordinary occasions of public necessity, to be called upon occasionally to act with alacrity and vigour, but not deriving from that circumstance, as far as this expedition was concerned, any title to a military character. Transports are associated with fleets and armies for various purposes connected with or subservient to the military uses of those fleets and armies. But, if they are transports merely, and as such are employed simply in the transportation of stores or men, they do not rise above their proper mercantile character in consequence of such an employment. To impress upon them a military character, their employment must be immediately applicable to the purposes of direct military operations, in which they are to take a part. The intimidation which induced the Dutch forces to desist from their attack on the British army, was an intimidation of which the ships were unconscious, and which would have been just as effectually produced by a fleet of mere transports; for any number of large ships known to be British, and not known to be merchantmen, would have produced the same effect. The intimidation was certainly passive; there was no animus or design on their part, nor even knowledge of the fact. No case can be alleged, in which terror so excited has been held to enure to the benefit of a non-commissioned vessel. The ships approached the coast with no hostile purpose entertained

by themselves; for they were totally ignorant of the object of the expedition. Where non-commissioned vessels have been held to be joint captors, they have chased *animo capiendi*, and have contributed materially to the act of capture. All cases of joint chasing at sea differ so materially from the cases of conjoint operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained, and much intimidation may be produced; but in cases of conjunct operations at land, it is not the mere intrusion even of a commissioned ship that would entitle parties to share. The words of the act of Parliament direct "that in all conjunct expeditions of the navy and army against any fortress upon the land directed by instructions from his Majesty, the flag and general officers, and commanders, and other officers, seamen, marines, and soldiers, shall have such proportionable interest and property as his Majesty under his sign manual shall think fit to order and direct." The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition, which the public authority has in no degree committed to them, should be permitted to derive an interest from such a spontaneous act to the disadvantage of those to whom the service was originally entrusted. The cases of chasing at sea, therefore, and of conjunct expeditions at land, stand on different principles, and there is little analogy that can make them clearly applicable to each other. It was also held, that if the vessel which was pronounced to be a joint captor had been manned, not by volunteers, but by detachments drafted from the rest of the ships by express orders from the commander-in-chief, that would not have made the rest of the ships entitled to be considered as acting likewise in

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capacity. Commanders-in-chief in a remote maritime, may exercise the power of impressing a part of their crews without giving to ships anything of a military character. It is within their power to press persons of any description to assist in any particular service in a case of emergency. Upon the whole of the facts the Court decided, that it had not been shewn that these ships set out in an original military character, or that any military character had been subsequently impressed upon them by the nature and course of their employment (*u*). So where a ship of war, conveying reinforcements to Lord William Bentinck, at Leghorn, heard in her passage the firing of a joint attack made by Lord William Bentinck and the fleet upon Genoa, and returned from Leghorn, and was in sight of Genoa at the time of the capitulation; but there was a perfect ignorance on both sides, the captors not being aware of the ship's presence, and the ship not having any knowledge of the force employed, or of the object of the attack (*v*). So, it was held, that a ship, despatched with a view to a contingent expedition to the East Coast of South America, and arriving at Buenos Ayres after the surrender of the place, was not entitled to share in the treasure captured there. It is a fixed rule, that no services antecedent or subsequent, unless the ship is employed in the identical service of the expedition, will impart a prize interest (*w*). Where vessels were captured by ships forming part of Lord Keith's fleet, employed in the blockade of Genoa, but detached to co-operate with an allied army, which had driven the enemy from a battery by which the vessels were protected: it was held, first, that the fleet was not entitled to share; secondly, that this was not a capture by a conjunct expedition within the meaning of the Prize Act, which applies only to joint expeditions of British land and

(*u*) The Cape of Good Hope, 2 Rob. 274.

(*v*) Genoa and Lavona, 2 Dod. 88.

(*w*) Buenos Ayres, 1 Dod. 28.

sea forces against some fortress upon the land, which is accessible by land on the one side, and by sea on the other; thirdly, that an agreement between Lord Keith and the commander-in-chief of the allied army for the division of all booty would not comprise captures at sea (*x*). In the case of a claim on the part of the army to share in a capture made by the fleet, the onus probandi lies upon them to shew, that there was an actual co-operation upon their part, assisting to produce the surrender. Much more is necessary than a mere being in sight to entitle an army to share jointly with the navy in the capture of an enemy's fleet. The mere presence, or being in sight of different parties of naval force, is, with few exceptions, sufficient to entitle them to be joint captors, because they are always conceived to have that privity of purpose, which constitutes a community of interests; but between land and sea forces acting independently of each other, and for different purposes, no such privity can be presumed; and, therefore, to establish a claim of joint capture between them, there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient. And, where there is no preconcert, it must not be a slight service, nor an assistance, merely rendering the capture more easy and convenient, but some very material service that will be deemed necessary to entitle an army to the benefit of joint capture. When there is preconcert, it is not of so much consequence that the service should be material, because then each party performs the service that was previously assigned to him; and whether that is important or not, it is not so material. The part is performed, and that is all that was expected. But where there is no privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing a slight aid, insignificant perhaps, and not necessary, that will entitle either party to share. The

(*x*) The *Stella del Norte*, 5 Rob. 349.

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It be such as were directly or materially in-  
capture, so that the capture could not have  
without such assistance, or at least not certainly,  
great hazard. The evidence, by which such a  
ported, must be clear and consistent, because it  
setting up an interest of joint capture to make  
case; the presumption is on the side of the actual  
so that, if it is at all doubtful, it is the duty of the Court  
to the interests of the actual captor. In the case  
Dordrecht, a victualling party from a Dutch squadron  
nha Bay, the Cape of Good Hope being in possession  
British army, was compelled, by advanced parties  
to the army, to abandon a supply of cattle which  
were preparing to remove from the coast. The whole  
was in sight of the squadron some hours before the  
of the English fleet, and a watering party of the enemy  
compelled to withdraw, and shots were exchanged between  
the advanced corps and a Dutch frigate. In a few hours the  
English fleet made its appearance, the Dutch squadron being  
then so situated, that the army could neither take nor annoy  
them. From the first appearance of the fleet the Dutch  
squadron was an object of certain capture or destruction;  
there was no chance of escape; an engagement was hopeless  
in regard to the superiority of the English fleet; and the  
crews of the Dutch vessels shewed no disposition to fight,  
being in every ship more or less in a state of mutiny. It was  
said, that they might have chosen the destruction of their  
ships, and that the presence of the army prevented them from  
resorting to this expedient; and there was some evidence to  
shew, that the English general had given notice to the com-  
mander-in-chief of the Dutch squadron, that if they attempted  
to destroy their ships, no quarter would be given to the crews  
escaping on shore: but it was held, that the principle of terror  
to support this claim, must be that of terror operating not



mediately and with remote effect, but directly and immediately influencing the capture. If such a principle of denunciation would be sufficient, a crowd of inhabitants on the coast would be entitled, if they had threatened to knock those on the head, who attempted to escape on shore after destroying their ships. Under all the circumstances of the case the Court pronounced against the claim of the army (y).

In cases of vessels not associated by public authority, to found a claim of joint capture there must be proof of an *animus capiendi*, and the claimant must at least be in sight of the capturing and captured vessel. As to the effect of being in sight, there is a distinction between king's ships and privateers. King's ships are under a constant obligation to attack the enemy wherever seen: a neglect of duty is not to be presumed, and therefore from the mere circumstance of being in sight a presumption is sufficiently raised that they are there *animo capiendi*. In the case of privateers the same obligation does not exist. The law therefore does not give them the benefit of the same presumption. Ships of this description go out very much on speculations of private advantage, which combined with other considerations of public policy are undoubtedly very allowable, but which do not lead to the same inference as that which the law constructs on the known duty imposed upon king's ships. A privateer is under no obligation to attack all she meets, but acts altogether on views of private advantage. She may not be disposed to engage in every contest, and therefore the presumption does not arise in any instance, that she is present *animo capiendi*. A contrary route, if proved, would defeat even the claim of a king's ship to the character of a constructive joint captor. But, if nothing appears either on the one side or on the other as to that fact, the mere presence would entitle a king's ship to the character of joint captor. Hence, where a king's ship was proved to have been in sight in the morning and at the

time of the capture, her claim to share was decreed, though she was becalmed and had not joined in the chase (z).

In the case of the *Drie Gebroeders*, a king's cutter and a privateer were going towards Guernsey in the same course. They both came to an anchor, being becalmed, and both entertained the intention of prosecuting their voyage when a breeze should spring up. The commander of the cutter went on shore, leaving orders that a vessel in sight should be watched, and that at a proper time she should be boarded, and that a signal should be made to him, if she should weigh anchor. The master of the cutter kept a watch upon the vessel: and perceiving a boat to go off to her from the privateer kept his sails hoisted to be in readiness, if resistance should be made, or if there should be any attempt to escape. The boat of the privateer, which lay nearer to the prize, was sent with eight men on board. There were seven men on board who might have resisted, if resistance had not been deemed hopeless from a view of the assistance which was to be expected from the cutter. As soon as the wind and tide served both ships got under weigh to proceed to Guernsey, and on the very first meeting the commander of the cutter took measures to assert his claim. It was held, that no circumstances were shewn which could have the effect of ousting the claim of the cutter, founded upon the general presumption which attaches to all king's ships (a).

To support a claim of joint capture, founded upon being in sight, it must be proved that the vessel claiming was seen by the prize as well as by the actual captor. Both these facts must be established: the one by direct evidence, the other by implication and necessary inference (b). Being in sight means being seen by the prize as well as by the actual captor, and thereby causing intimidation to the enemy and encouragement

(z) *La Force*, 5 Rob. 268: *The Galen*, 2 Dod. 19.

(a) *The Drie Gebroeders*, 5 Rob. 339.

(b) *The Faircland*, 5 Rob. 120.

to the friend. One of these will not do without the other (c). A king's ship seen by the prize steering in pursuit, and continuing in pursuit up to the time of capture, will be entitled to share, though the sight is now and then obscured. Nor will the circumstance of her steering a course different from that of the actual captor be material; for the situation and bearing of the ships to the prize and to each other, may frequently make it proper that they should shape their courses in directions not precisely the same (d). Where a joint chaser was in sight, when darkness came on, and continued steering the same course by which it was before nearing the prize, and the prize continued to steer the same course; it was held to amount to a demonstration, that the joint chaser would have been in sight, if darkness had not intervened, and the ship was held entitled to share as joint captor (e). A discontinuance of chase occasioned by fraud or laches of the actual captor will not defeat the claim of a joint captor. In the case of the *Herman Parlo*, it was suggested that the actual captor had extinguished his lights, in order to prevent other ships from seeing the chase or capture; and the superior Court held, that no effect should be given to any conduct on the part of the other ship so produced, and that the other ship, though not in sight nor actually chasing, should share (f). In the case of the *Eendraught*, the alleged joint captors had fallen in with the actual captor the day before, and were known by him to be British vessels; the next day all three chased the prize, and the claimants were in sight when the captor came up with the prize. On coming up the captor hoisted American colours, and offered to protect the prize against the other two ships, the claimants. By this artifice, which was intended to defer the capture and to defraud the other ships of their rights as

(c) *La Melanie*, 2 Dod. 122.

(d) *The Sparkler*, 1 Dod. 359.

(e) *The Union*, 1 Dod. 346.

(f) *Herman Parlo*, Lords, 1785, cited *Per Cur.* 3 Rob. 8.

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he induced the prize to change her course till at night, when the other ships were out of sight, she becoming alarmed and attempting to sheer off, possession of. The Lords of Appeal confirmed the decision of the Court below, admitting the claim of the joint captors, and condemning the appellant in the costs of appeal and costs below (*g*). So, an actual captor is liable to be condemned with costs, where he has given false information to defraud a joint captor of his rights (*h*). Where two convoys of ships were detached to reconnoitre two ships, which turned out to be a British frigate and a ship she afterwards captured; and the frigate signalled her number, but made no signal of an enemy's ship a-head, it was therefore concluded, that the ship a-head was a prize, and the convoying ships were recalled; it was held, that if the signal ought to have been made, and was through neglect or inattention not made, though without any intention to deceive, the conduct of the convoying ships in discontinuing the chase and altering their course, was as much produced by that neglect and inattention as by the fraud imputed in the case of the *Herman Parlo*; and the effect being the same, the same legal consequence would follow (*i*). So, where a non-commissioned schooner had maintained a severe engagement with the prize in the morning, and though beaten off continued to hang upon her the whole day; and afterwards the actual captor came up, and in consequence of her hoisting French colours the schooner sheered off, but came up immediately upon the captor hoisting British colours, and taking possession; it was held, that the schooner's change of course was no discontinuance of chase, and the claim of the Admiralty was sustained (*k*). Convoys of ships are under no disability of

(*g*) *The Fendraught*, 3 Rob. Appen. 35.

(*h*) *The Sparkler*, 1 Dod. 359.

(*i*) *The Waaksamheid*, 3 Rob. 1.

(*k*) *La Virginie*, 5 Rob. 124.

claiming as joint captors, where the capture is not made at such a distance as would remove them from the performance of their special duty of protecting their convoy (*l*). Where a king's ship and a privateer were joint chasers, and the privateer came up first and struck the first blow, but the king's ship was the actual taker; they were held to be joint actual recaptors, and one-sixth salvage was decreed to be apportioned according to their respective forces (*m*). Where a privateer was the actual recaptor, and a salvage of one-sixth was decreed, a king's ship in sight was pronounced to be entitled to share only in the proportion of an eighth. For the rules of constructive capture are less favourable to privateers; and therefore it would be hard if the privateer, not having a reciprocal interest in other cases, should only share on terms of reciprocity, when the king's ship is only a constructive recaptor from the mere accident of being in sight, perhaps, at a great distance (*n*). A king's ship being joint captor, has no authority to dispossess the actual captor, whether privateer or non-commissioned vessel: such a practice on the part of kings' ships is highly improper, but they are entitled to put some one on board to take care of their interest (*o*). It is not essential, but a measure of proper precaution and of great convenience, that an interest should be asserted at the time. Where expenses were incurred by the actual captor in consequence of an omission of this precaution, they were directed to be paid out of the proceeds (*p*). A claim of joint capture founded on being in sight cannot be sustained, where the identity of the prize and the vessel seen is not established (*q*). Nor can it be supported on the sole testimony of persons on board the ship claiming as joint captor. This has been repeatedly decided,

(*l*) *The Waaksamheid*, 3 Rob. 1; *The Fury*, 3 Rob. 9.

(*m*) *The Wanstead*, Edw. 268.

(*n*) *The Providence*, Edw. 370.

(*o*) *La Flore*, 5 Rob. 271; *The Marianne*, 5 Rob. 13; *The Sacra Familia*, 5 Rob. 362; *The San Jose*, 6 Rob. 244.

(*p*) *The Amitie*, 6 Rob. 268.

(*q*) *The Lord Middleton*, 4 Rob. 153.

have the effect of binding his owners and crew, and excluding all claim to share as joint captor (*x*). Where ships are in sight under such circumstances that they can occasion no terror to the enemy, nor afford any encouragement to the friend, they are justly deemed not entitled to a share of the benefit. A case of this kind occurred in the Admiralty Court in the year 1746, that of the *Margaret*. In that case there were three ships asserting an interest; one of which, the *Queen of Hungary*, was present at the time of the capture, but performed no service. Another, the *Trial*, was in sight, but at a very considerable distance from the scene of action, and likewise performed no service. The third ship, the *Terrible*, engaged the enemy for three hours, and effected the capture. Sir Henry Penrice, who was at that time Judge of the Admiralty, awarded three-fourths of the prize to the *Terrible*; one-fourth to the *Queen of Hungary*, and nothing to the third ship, which was at a great distance, although within sight (*y*). In the case of the *Melanie*, the actual captor had exchanged signals during the chase with a squadron lying on the opposite side of the isle of Oleron, blockading the isle of Aix, and parts of the masts of the vessels composing the squadron were seen by the prize at a great distance at the time of the capture: it was held, that it would be carrying the principle of being in sight further than it had been carried by any former decision, if upon proof so indistinct the Court were to pronounce for the interest of the squadron. The Court will entertain the ancient principle, but will not extend it; it has already gone great lengths, and is not at all inclined to carry the legal interpretation one step further; to pronounce in favour of such a claim would be in direct opposition to the case of the *Margaret*; taking into consideration all the circumstances of the case, that the chase was commenced by the captor only; that but for his acts the prize never would have been seen by

(*x*) The *William and Mary*, 4 Rob. 381.

(*y*) The *Margaret*, cited *Per Cur.* 2 Dod. 125.

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n; that the squadron was engaged in a blockade of the best kind, which rendered it imperative upon them to desert their post; that they were lying at anchor with their sails furled in the bottom of a bay into which the wind was blowing strong; the Court pronounced against the interest of the squadron (z).

A ship or fleet, that by accident or design diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, is not thereby entitled to share as joint captor (a). The Amethyst and Emerald were separately in pursuit of a vessel, which proved to be a French frigate, which changed her course on perceiving the Emerald: the Emerald lost sight of the enemy in a fog, and continued on in search of her: the Amethyst engaged her, and when the Amethyst and the enemy were both crippled, the Arethusa came up and took possession: the Emerald not being then in sight was pronounced not to be entitled to share (b). A ship not in sight at the time of the capture is not entitled to share, because she had joined in chasing the prize with a constructive joint captor, and had been delayed by orders to pick up her boats. It may be deemed a hardship that a vessel should lose the benefit of sharing in the prize, in consequence of the delay occasioned by those orders fairly given, and without any view of depriving the ship of her share in the prize. The answer is, that it is the first duty of king's officers to obey the lawful commands of their superiors; and that views of mere private advantage are of secondary consideration, and must give way to the imperative requisitions of the public service. The admission of a constructive captor to share with the actual captor is an indulgent construction of the law, which must not be further extended (c). Construc-

(z) *La Melanie*, 2 Dod. 122.

(a) *Le Niemen*, 1 Dod. 9.

(b) *Le Niemen*, 1 Dod. 9.

(c) *The Financier*, 1 Dod. 61.

tive assistance by the boats of a ship, not in sight, cannot entitle their ship to share in the prize; though actual capture by the boats would be sufficient for that purpose, for they are a part of the force of the ship. Four boats of a ship belonging to a squadron were despatched in search of the enemy, supported by two schooners, one of which formed part of the squadron; and the other, though only by accident on the spot, by the practice of the navy, became subject to the orders of the admiral. The boats were obliged to return many hours before the capture took place, being unable to proceed on account of wind and weather, after putting some of their men on board the actual captor. It was held, that the boats could in no way be considered as actual captors, and could convey no interest to their ship; that they were themselves not entitled as constructive captors, since they had relinquished the chase, and returned to the harbour before the capture took place; and that the men put on board were entitled to share as part of the crew of the actual captor on that occasion, and not as part of the crew of their own ship (*d*). So, when a private ship of war and a king's ship were lying in harbour, and sent out their boats to make a capture, which was effected by the boats of the king's ship: it was held, that the boat of the privateer, not coming up at the time of the capture, was not entitled to share, and could convey no interest to her ship, though the boat's crew assisted in navigating the prize into port. There is a very solid distinction between the claims of a boat in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs has done by means of this boat, all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction, which is laid upon the supposed intimidation of the enemy, and the encouragement of the friend, applies very weakly to the case of a boat, an object which attracts

(*d*) *La Belle Coquette*, 1 Dod. 18.



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upon the water, and whose character, even if it may be totally unknown. It would be still more unreasonable, if the constructive co-operation of such an interest would give an interest to the entire ship, to which it belongs. When a ship is in sight she is conceived to co-operate in the proportion of her force; but there is no room for such a presumption, when she co-operates only by the force of her boat (*e*).

With respect to privateers, sight is not sufficient to entitle them to share as joint captors. It would open a door to very frequent and practicable frauds, if, by the mere act of hanging on upon the king's ships, privateers should be held to entitle themselves to an interest in the prizes which the king's ships take (*f*). The rule of law upon this subject, which has been long established, both in the Court of Admiralty and in the Court of Appeals, is, that it must be shewn on the part of privateers that they were constructively assisting. The being in sight is not sufficient with respect to them to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war from views of private advantage only. They are not bound to put their commissions in use on every discovery of an enemy; and, therefore, the law does not presume in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance and engaging in the contest. There must be the *animus capiendi* demonstrated by some overt act; by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been effectually entertained. Where a privateer, in sight at the time of the capture, had been pursuing her course towards land in the track in which the prize was afterwards taken; without crowding sail, or any variation of route; or any movement,

(*e*) The *Odin*, 4 Rob. 318.

(*f*) The *Santa Brigada*, 3 Rob. 52.

that would not have taken place without any intention to capture; it was held, to be impossible to pronounce for an interest of joint capture. But with respect even to privateers, the act of chasing, if continued for any length of time, and not relinquished before capture, will be sufficient to found a title of joint capture. It will not be necessary that the joint chaser should actually board the prize; it will be enough, if there is an *animus persecuendi*, sufficiently indicated by the conduct of the vessel, and not discontinued (*g*). Revenue cutters are upon the same footing as privateers with respect to constructive joint capture, and are not entitled to share by the mere fact of being in sight; for not being under the same obligations as king's ships, to attack the enemy, they are not entitled to the same presumption in their favour (*h*). Where a privateer attempted to get between the prize and the land, and was of service, by diverting the attention of four frigates, by whom she was discovered and chased; it was held, that such diversion was a mere casualty, totally unconnected with all merit, actual or constructive; that if she had been captured, it would have produced exactly the same effect in a still stronger degree, and yet it would have been perfectly ludicrous to pronounce for her joint interest of capture under such circumstances (*i*).

(*g*) *The Amitie*, 6 Rob. 261.

(*h*) *The Bellona*, Edw. 63.

(*i*) *The Santa Brigada*, 3 Rob. 52.

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## CHAPTER X.

## OF PRIZE COURTS.

The maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereon as prize in a Court of Admiralty, judging by the law of nations and treaties. The proper and regular Court for these proceedings is the Court of that state to which the captor belongs.

The evidence to acquit or condemn with or without costs and damages, must, in the first instance, come merely from the ship taken; viz., the papers on board, and the examination on oath of the master and other principal officers; for which purpose there are officers of Admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from them ground to condemn there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into further proof thereof.

A claim of ship or goods must be supported by the oath of somebody at least as to belief.

The law of nations requires good faith; therefore every ship

must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction. To enforce these rules, if there be false or colourable papers; if any papers be thrown overboard; if the master and officers examined in *præparatorio* grossly prevaricate; if proper ships' papers are not on board, or if the master and crew cannot say whether the ship and cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to and expressly stipulated by many treaties (*a*).

Though from the ship's papers and the preparatory examinations the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect: if he will not shew the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or according to the circumstances of the case may be justly entitled to receive his costs.

If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a superior Court of Review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal;

(*a*) Treaty between England and Holland, 17th February, 1668, Article XIII. Treaty, 1st December, 1674, Article X. Treaty between England and France, at St. Germain, 24th February, 1677, Article X. Treaty of Commerce at Ryswick, 20th September, 1697, between England and Holland, Article XXX. Treaty of Commerce at Utrecht, 31st March, 1713, between Great Britain and France, Article XXIX.

and this superior Court judges by the same rule which governs the Court of Admiralty, viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

If no appeal is offered it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

This manner of trial and adjudication is supported, alluded to and enforced by many treaties (*b*). In this method by Courts of Admiralty acting according to the law of nations and particular treaties, all captures at sea have invariably been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable. Though the law of nations be the general rule, yet it may by mutual agreement between two powers be varied or departed from : and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to

(*b*) Treaty between England and Holland, 17th February, 1668, Articles IX. and XIV. Treaty, 1st December, 1674, Article XI. Treaty, 29th April, 1689, Articles XII. and XIII. Treaty between England and Spain, 23rd May, 1667, Article XXIII. Treaty of Commerce at Ryswick, 20th September, 1697, between France and Holland, 26th and 31st October. Treaty between England and France, 3rd November, 1655, Articles XVII. and XVIII. Treaty of Commerce between England and France, at St. Germain's, 29th March, 1652, Articles V. and VI. Treaty at St. Germain's, 24th February, 1677, Article VII. Treaty of Commerce between Great Britain and France, at Utrecht, 31st March, 1713, Articles XXVI. and XXX. Treaty between England and Denmark, 29th November, 1669, Articles XXIII. and XXXIV. Maritime Convention between Russia, Denmark, Sweden and Great Britain, 7<sup>th</sup> June, 1801, Articles VI., and the four additional Articles of 28<sup>th</sup> October, 1801. With respect to appeals or reviews. Treaty between England and Holland, 1st December, 1674, Article XII., as it is explained by Article II. of the Treaty at Westminster, 6th February, 1715, 16. Treaty between England and France, at St. Germain's, 24th February, 1677, Article XII. Treaty of Commerce at Ryswick, 20th September, 1697, between France and Holland, Article XXXIII. Treaty of Commerce at Utrecht, 31st March, 1713, between Great Britain and France, Articles XXXI. and XXXII. Maritime Convention between Great Britain and Russia, Denmark and Sweden, respectively.

the treaty; and the law of nations only governs so far as it is not derogated from by the treaty (c).

Such are the principles which govern the proceedings of the Prize Courts. The following are the measures which ought to be taken by the captor and by the neutral claimant upon a ship and cargo being brought in as prize. The captor, immediately upon bringing his prize into port, sends up and delivers upon oath to the registry of the Court of Admiralty all papers found on board the captured ship. In the course of a few days the preparatory examinations of the captain and some of the crew of the captured ship are taken, upon a set of standing interrogatories before the commissioners of the port to which the prize is brought, and which also are forwarded to the registry of the Court of Admiralty as soon as taken: a monition is extracted by the captor from the registry, and served upon the Royal Exchange, notifying the capture, and calling upon all persons interested to appear and shew cause, why the ship and goods should not be condemned. At the expiration of twenty days the monition is returned into the registry, with a certificate of its service; and, if any claim has been given, the cause is then ready for hearing upon the evidence arising out of the ship's papers and preparatory examinations. The measures taken on the part of the neutral master or proprietor of the cargo are as follows: upon being brought into port the master usually makes a protest, which he forwards to London as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship, or such parts of the cargo as belong to his owners, or with which he was particularly entrusted; or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps. The master, correspondent, or consul applies to a proctor, who prepares a claim supported by the affidavit

of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest therein: security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein. If the captor has neglected in the meantime to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions and by the Prize Act to proceed immediately to adjudication), a process issues against him, on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition, the cause may be heard. It however seldom happens, owing to the great pressure of business, (especially at the commencement of a war), that causes can possibly be prepared for hearing, immediately upon the expiration of the time for the return of the monition; in that case, each cause must necessarily take its regular turn. Correspondent measures must be taken by the neutral master, if carried within the jurisdiction of a Vice-Admiralty Court, by giving a claim, supported by his affidavit, and offering a security for costs, if the claim should be pronounced grossly fraudulent. If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the Court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence), and he afterwards applies at the registry of the Lords of Appeal in prize causes, which is held at the same place as the registry of the High Court of Admiralty, for an instrument called an inhibition, and which should be taken out within three months, if the sentence be in the High Court of Admiralty, and within nine months, if in a Vice-Admiralty Court, but may be taken out at later periods, if a reasonable cause can be

alleged for the delay which has intervened. This instrument directs the Judge, whose sentence is appealed from, to proceed no further in the cause. It directs the registrar to transmit a copy of all the proceedings of the inferior Courts; and it directs the party, who has obtained the sentence, to appear before the superior tribunal to answer to the appeal. On applying for the inhibition, security is given on the part of the appellant to the amount of two hundred pounds, to answer costs, in case it should appear to the Court of Appeal, that the appeal is vexatious. The inhibition is to be served upon the Judge, the registrar, and the adverse party, and his proctor, by shewing the instrument under seal, and delivering a note of its contents. If the party cannot be found, and his proctor will not accept the service, the instrument is to be served *viis et modis*, that is, by affixing it to the door of the last place of residence, or by hanging it on the pillars of the Royal Exchange. That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the Court. A certificate of the service is endorsed upon the back of the instrument, sworn before the surrogate of the superior Court, or before a notary public, if the service is abroad.

If the cause be adjudged in the Vice-Admiralty Court, it is usual, upon entering the appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and serve the inhibition, as when the cause has been adjudged in the High Court of Admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.



Upon an appeal, fresh evidence may be introduced ; if, upon hearing, the Lords of Appeal should be of opinion, that the case is of such doubt, as that further proof ought to have been ordered by the Court below.

Further proof usually consists of affidavits made by the asserted proprietors of the goods in which they are sometimes joined by their clerks, and others acquainted with the real transactions, and with the real property of the goods claimed. In corroboration of these affidavits may be annexed original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by affidavits of persons, who can speak of their authenticity ; and if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before magistrates, or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British consul.

The degree of proof to be required depends upon the degree of suspicion or doubt that belongs to the case. In cases of heavy suspicion and great importance the Court may order what is called "plea and proof," that is, instead of admitting affidavits and documents introduced by the claimant only, each party is at liberty to allege in regular pleadings, such circumstances as may tend to acquit or condemn the capture, and to examine witnesses in support of the allegations, to whom the opposite party may administer interrogatories. The depositions of witnesses are taken in writing. If the witnesses are to be examined abroad, a commission issues for that purpose ; but in no case is it necessary for them to come to England. These solemn proceedings are seldom resorted to.

Standing commissions may be sent to any neutral country for the general purpose of receiving examinations of witnesses, in all cases where the Court may find it necessary for the

purposes of justice, to decree an inquiry to be conducted in that manner (*d*).

In the United States of America the original jurisdiction, in questions of prize, is vested in the district or circuit Courts, with an appeal from the district to the circuit Court, and from the circuit Court to the supreme Court of the United States (*e*).

In France the jurisdiction of prize causes, from the earliest times, belonged to the admiral, with an appeal to the supreme council. It appears, however, that in early times the officers of the Admiralty exercised judicial functions in smaller prize causes, and there was an appeal from them to the admiral sitting at the marble table, or to the Parliament. These appeals were found to be so inconvenient, that some time after 1584 the exclusive jurisdiction in prize causes was given to the admiral, or those, who, under different titles, exercised his office. In cases of difficulty some councillors of state, or some masters of requests, were commissioned to assist him. But appeals becoming inconveniently frequent, in 1659 a standing commission of councillors of state and masters of requests was appointed to assist the admiral, and the Court so formed was styled the Council of Prizes; but the proceedings were entitled in the admiral's name, and an appeal was reserved to the Council of State, and from the Council of State to the Royal Council of Finances (*f*).

In England jurisdiction in cases of prize, whether a capture be made on the sea, or in a creek, haven, or river, or be commenced on the sea, and consummated upon the land, or be made upon land by ships' crews in a descent upon the shore, or a place be terrified into surrender by a force at sea, is exercised by the Judge of the Admiralty Court exclusively of every

(*d*) Letter from Sir William Scott and Dr. Nicholl to Mr. Jay, the American Minister.

(*e*) Kent. Comm. i. 280.

(*f*) Val. Comm. iii. 9, xxi.

other judicature of every kind, except upon appeal (g). To constitute his authority, or to call it forth, in every war a commission under the great seal issues to the Lord High Admiral to will and require the Court of Admiralty, and the lieutenant and Judge of the said Court, his surrogate or surrogates, and they are thereby authorized and required to proceed upon all, and all manner of captures, seizures, prizes and reprisals that are or shall be taken, and to hear and determine according to the course of the Admiralty and the law of nations. A warrant issues to the Judge accordingly. The monition and other proceedings are in his name, with all his titles of office, rank and degree, adding emphatically, as the authority under which he acts, the following words:— and also to hear and determine all, and all manner of causes and complaints as to ships and goods seized and taken as prize, specially constituted and appointed. The appeal lies to commissioners consisting of the Privy Council. A thing done upon the high seas does not come within the jurisdiction of the Courts of common law. For the seizing, taking, or stopping a ship upon the high seas, not as prize, an action will lie; but for taking as prize no action will lie. The nature of the question excludes, not the locality. The end of the Prize Court is to suspend the property till condemnation; to punish every sort of misbehaviour in the captor; to restore instantly *velis levatis*, as the books express it, if upon the most summary examination there does not appear a sufficient ground of seizure; to condemn finally, if the goods really are prize, against every body, giving every body a fair opportunity of being heard. A captor may and must force every person interested to defend, and every person interested may force him to proceed to condemn without delay.

The Prize Court has uniformly without objection tried all captures in ports, havens, &c., within the realm. It happens

(g) *Lindo v. Rodney*, 2 Doug. 613; *Le Caux v. Eden*, *ibid.* 594.

often. Ships not knowing of hostilities come in by mistake. Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made. They can only be condemned in the Court of Prize. What is still more extensive, foreign ports or harbours are not the high sea any more than the shore, but numberless captures made there have been condemned as prize. Hostilities are committed by ships and the men aboard at sea, or ashore. A fight begins, the vanquished runs ashore, gets the goods out, is pursued ashore, and the goods are taken. A fort or town is taken by the force of ships at sea, and is ransomed; or plate, money, and valuable effects taken. The means this country has of annoying and making reprisals upon an enemy is by naval expeditions. There never was, there never will be a single ship, which has not a view to operations upon land, if occasion should offer.

In many old treaties the usual stipulation is, that the subjects of one prince shall do no injury to the subjects of the other by land, or sea, or in fresh waters, or in port. It is not by accident, therefore, that the words of the commission are general; all manner of captures, seizures, prizes, and reprisals of all ships and goods. It does not say upon the sea; it does not say goods in ships. Reprisals is the most general word that can be used. It is in the view of every ship much more of every fleet which sails to make reprisals, to act on shore. There is no place of note which can be attacked where neutral and British subjects do not reside, or have property, or where the enemy may not colourably borrow their names. If it is not within the jurisdiction of the Prize Court, the captors are in a miserable condition indeed. The prize cannot be condemned. If granted it cannot be shared. Every officer and sailor may be liable to actions without number. It would be equally mischievous to fair claimants. They could not have

their property restored instantly, upon their own papers, books, and affidavits.

By the law of nations and treaties, every nation is answerable to another for all injuries done by sea, or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for the trial of prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captor for damages, and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant, and subjects his property to the rules and authority of a municipal law, by which he is not bound. In short, every reason which created a Prize Court as to things taken upon the high seas, holds equally when they are taken upon land, but the original cause of taking is at sea. The reason for a jurisdiction to judge a capture at sea and such a capture on land is exactly the same.

In 1498 there was a treaty entitled *confirmatio tractatûs contra spolia maritima et pro deprædatoribus coercendis* between Henry VII. and Louis XII., confirming one before made with Charles VIII., and in 1526, another between Henry VIII. and Francis I. (*h*). They stipulate, that before any ship goes out of port the admiral shall take sufficient security from the owners, that the master and mariners shall keep the peace towards the subjects of the other prince; and shall do them no injury or violence by land, or sea, or in fresh waters, or in any port. The mariners are to take an oath, that when they return with their ship and spoils, if they take any, they will immediately inform the admiral or his officers

(*h*) Rymer, xii. 690 ; xiv. 147.

of the port from which they sailed of their plunder, (*præda*), spoils, and goods, without whose decree and permission they shall not be suffered to convey them out of their ships, or to exchange, sell, or aliene them. Nobody is to purchase, &c. from them, before the admiral, &c., have declared them to be lawful prize and capture; but if it be found that the said plunder (*præda*) was taken away from the subjects, lands, kingdoms, or dominions of either of the said kings, the goods taken with damages and interest shall without delay be ordered to be restored to the persons who have been plundered, and sentence is to be against masters, partners, owners, and sureties. Either party aggrieved may appeal to the supreme council. These treaties demonstrate the jurisdiction of prize taken in the Admiralty and commissioners of appeal then, to have been pretty much as it is now. Ships of war are to give security to do no injury or violence by land, or sea, or in fresh water, or in any port. When they return with prize, they are to disclose it. If they have taken from the subjects, lands, kingdoms, or dominions of either, instant restitution is to be made with costs and damages. If taken from the subject in the land of an enemy, it is to be restored. If taken from the land of either prince, though the goods of an enemy, it is to be restored; it is a breach and a violation of his territory. It manifestly appears from these treaties, that the jurisdiction equally extended to goods taken by ships or their crews on land and at sea. They shew too, that no property vests in any goods taken by a ship or her crew, till condemnation as lawful prize, which continues law to this day. In the reign of Queen Elizabeth and former reigns, many special commissions issued to inquire into depredations by violators of treaties and the law of nations, which are to be seen in Rymer. But the most ancient instrument shews a jurisdiction either inherent or by commission in the admiral. It is a letter from Edward III. to the King of Portugal (*i*),

(*i*) Rymer, vi. 15.

and recites a complaint that the admiral, before whom the goods were judicially demanded, determined that they should not be restored, as having been taken in war. Since the reign of Queen Elizabeth no special commission appears to have issued; but the Judge of the Admiralty either by virtue of an inherent power, or by commission, or both, has solely exercised the jurisdiction of prize. So far back as particular cases can be traced, the Admiralty has judged of and condemned goods taken on land as prize, as well as goods taken at sea. Every common law authority to be found on the subject allows and supports the jurisdiction; and the Legislature has in many acts of Parliament recognised and referred to it, as clear, certain, and undoubted (*k*). The true reason why the jurisdiction is appropriated to the Admiralty is, that prizes are acquisitions *jure belli*, and *jus belli*, is to be determined by the law of nations, and not the particular municipal law. The jurisdiction does not depend upon locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations (*l*).

It is the common practice of European states in every war to issue proclamations and edicts on the subject of prize. But till they appear, Courts of Admiralty have a law and usage, on which they proceed from habit and ancient practice as regularly as they afterwards conform to the regulations of their Prize Acts (*m*). By the Prize Act of 1805, 45 Geo. 3, c. 72 (*n*), it is enacted, Section XLIII., that for more speedy proceeding

(*k*) *Lindo v. Rodney*, 2 Doug. 613.

(*l*) *Le Caux v. Eden*, 2 Doug. 607.

(*m*) *Santa Cruz*, 1 Rob. 61.

(*n*) This act expired with the war; but there can be little doubt, that in the event of war it would be re-enacted, since it is for the most part declaratory of the law of nations, and as far as regards the grant and distribution of prize property it refers to the prize proclamation, an instrument which has been frequently varied in many particulars. The last proclamation, bearing date the 15th June, 1808, will be found in the Appendix to this volume.

to condemnation or other determination of any prize ship, or vessel, goods, or merchandize already taken or hereafter to be taken as aforesaid, and for lessening the expenses that have been usual in such cases: the Judge of the High Court of Admiralty of England, and of any other Court of Admiralty that shall be authorized thereto, or such person or persons who shall be by them commissioned for that purpose, within five days after request made to him or them for that purpose, shall finish the usual preparatory examination of the persons commonly examined in such cases, in order to prove the capture of the lawful prize, or to inquire whether the same be lawful prize or not; and that the proper monition usual in such cases shall be issued by the person or persons proper to issue the same, and shall be executed by the person or persons proper to execute the same within the space of three days after request in that behalf made; and in case no claim of such captured ship, vessel or goods shall be duly entered in the usual form, and attested upon oath, giving twenty days' notice after the execution of such monition; or if there be such claim, and the claimant shall not within five days from the time of such claim give security in the sum of sixty pounds sterling to pay costs to the captor, in case the Judge shall decree costs to be due, that the Judge of such Court of Admiralty shall, upon producing to him the said examination or copies thereof, and producing to him upon oath all the papers and writings which shall have been found taken in or with such capture, or on board any other captured ship or vessel regarding the same; or upon oath made that no papers or writings were found, proceed with all convenient speed to sentence either to discharge or acquit such capture, or to condemn the same to be good and lawful prize, according as shall appear to him upon perusal of such preparatory examinations, and all the papers or writings found, taken, &c., or to allow further time for a claim to be entered or security given: and in case any such claim shall be duly entered, and securi-



given thereupon according to the tenor and true meaning of this act, and there shall appear no occasion to enter into any further examination, that then the Judge shall within ten days, if possible, after such claim made and security given, proceed to sentence as aforesaid touching such capture: but in case upon entering such claim and the attestation thereupon, or the producing of such papers and writings as aforesaid regarding such captured ship or vessel or goods, and upon the said preparatory examinations it shall appear doubtful to the said Judge whether such capture be lawful prize or not, and it shall appear to him to be necessary, according to the circumstances of the case, for the clearing and determining of such doubts, to have an examination of witnesses on pleadings given in by the parties, and admitted by such Judge, or such other lawful mode of inquiry as the said Judge may think requisite; that the said Judge shall forthwith cause such capture to be appraised by persons well skilled in the same, to be named by the parties and approved by the Court, and sworn truly to appraise the same according to the best of their skill and knowledge; for which purpose the said Judge shall cause, if he shall think fit, the goods found on board to be unladen, and (an inventory thereof being first taken, if the Judge shall think necessary, by the Marshal of the Admiral or his deputy) shall cause them to be put into proper warehouses, with separate locks, &c., at the charge of the party desiring the same: and shall after such appraisement, and within the space of fourteen days after the making of the said claims, proceed to take good and sufficient security from the claimants to pay the captors the full value thereof, according to such appraisement, in case the same shall be adjudged lawful prize; and shall also proceed to take good and sufficient security from the captors to pay such costs as the Court shall think proper in case such ship, vessel, or goods shall not be condemned as lawful prize; and after such security given, the said Judge shall make an interlocutory order for releasing or delivering the same to such

claimant or his agent, and the same shall be actually released and delivered accordingly.

Section XLVI. That all books, papers, and writings found in any ship or vessel taken as prize, shall without delay be brought into the registry of the Court of Admiralty (upon oath), wherein such ship or vessel may be proceeded against in order to condemnation; but that only such books, papers, and writings shall be made use of and translated as shall be agreed or insisted upon by the proctors of several parties captors or claimants, or, in case of no claim, by the captor or his proctor, or agent or registrar, to be necessary for ascertaining the property of such ship or vessel, and cargo thereof.

The only evidence that can regularly be produced in the first instance are the ship's papers and the preparatory examinations. When there is a repugnance between the depositions and documents the general rule is to receive further proof; but this rule is liable to many exceptions. The exceptions may sometimes be in favour of depositions, and sometimes, though more rarely, in favour of the documentary evidence. A case may exist, in which the witnesses may appear to speak with such a manifest disregard to truth, that the Court may decide in favour of papers bearing upon them all the characters of fairness and veracity. On the other hand it may, and does more frequently happen, that the papers betray such a taint and leaven of suspicion on the face of them, as will give a decided preponderancy to the testimony of the witnesses examined, especially if the witnesses give a natural account of the part they took in the transaction, and in a manner so distinct and clear as to carry with it every degree of moral probability. Suppose, the case of a ship furnished with documents before there has arisen any apprehension of a war, there could then be no reason for the introduction of fraudulent papers: fraud is always inconvenient, and is seldom adopted as a matter of choice; under such circumstances there is no particular ground of suspicion against the documents. But on

the other side suppose that there is a war, or an apprehension of war when the documents are composed, here they become subject to some suspicion in limine, which suspicion may be increased by their having passed through the enemy's hands. The suspicion will be still further increased if the property to which they relate has continued under the management and direction of the enemy. And if, in addition to all this, they carry such contradictions or difficulties on the face of them as cannot be explained, admitting the matter to be a fair transaction, all or any of these circumstances must devalue the papers of their natural credit (*o*). Papers by themselves prove nothing; they are a mere dead letter if they are not supported by the oaths of persons in a situation to give them validity: the master must verify his papers. In the case of a carrier-master, it may be expected that the verification should be less positive, than when he is himself the agent, but he must at least depose, that he believes the cargo to be, as asserted in the claim (*p*).

The rule of the English Courts of Admiralty, conformably to the general practice of nations, directs the evidence to be taken from persons on board the captured ships. Among the interrogatories that are addressed to them, there are some on which the captors might be supposed to be equally qualified to supply information; the number of the crew, the place of capture, and many other circumstances, which are included in the number of standing interrogatories, are as much in the cognizance of the captors as of the other parties. The general rule of law notwithstanding is, that on all points the evidence of the claimants alone shall be received in the first instance; and if no doubt arises upon that view of the case, the Court is bound by the general law, as well as by the act of the British Legislature, to take those points as fully demonstrated (*q*). A claim cannot be admitted, which stands in entire opposition to

(*o*) The *Vigilantia*, 1 Rob. 4, *et seq.*

(*p*) The *Juno*, 2 Rob. 122; The *Odin*, 1 Rob. 253.

(*q*) The *Haabet*, 6 Rob. 55.

the preparatory examinations, except in cases arising before war (*r*). The witnesses are produced in the presence of the agents of the parties, before the commissioners and actuary, whose duty it is to superintend the regularity of the proceeding, and to protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him, and then becomes evidence common to both parties; it being very rarely permitted to the captor to produce any evidence (*s*). Fresh witnesses cannot be examined after the publication of the evidence in a cause, without leave of the Court. The term probatory is regularly concluded by the publication, and it is for the Court alone to open the term again, as it may seem fit to its discretion, which will be influenced only by an assurance that the party has not seen the depositions, and that he was prevented by some cause from examining the proposed witness in time (*t*). All papers on board must be produced. The commissioners are not to exercise any discretion as to the reception of papers; every ship's paper is of importance, and the commissioners are bound to receive it (*u*). But where two days after the vessel came into port, a man produced himself as supercargo, and offered papers, in his possession, and the commissioners declined to examine him; the Court refused to order the papers to be received (*v*).

Where the ship's papers and depositions do not satisfy the Court of the truth of the claim, further proof may be allowed. Where a pass was informal, but the ship had another pass on board that offered some slight evidence of neutrality, further

(*r*) *The Vrouw Anna Catharina*, 5 Rob. 19.

(*s*) *The Apollo*, 5 Rob. 286.

(*t*) *The William and Mary*, 4 Rob. 381; *The Speculation*, 2 Rob. 294.

(*u*) *The Jonge Jacobus*, 1 Rob. 247.

(*v*) *The Anna*, 1 Rob. 331.

proof was allowed (*w*). Where bullion was shipped on board a vessel bound to a neutral port; further proof was required that it was going in payment for cargoes already received by the enemy (*x*). When it was alleged that a ship was driven into a blockaded river by stress of weather; further proof was allowed of the state of the winds (*y*). The nature of further proof varies with the circumstances of each particular case. As to cargoes, the general rule has been, that where the shipment is from the port of one enemy to the port of another enemy, a double correspondence should be exhibited, because there is a double interest to be rebutted. When the trade is from the port of an enemy to a neutral port, the correspondence with the shipper is all, that is usually required (*z*). In a case of great suspicion, in addition to the correspondence, invoices, and bills of lading, the attestations of confidential clerks were required, and the insurance or a certificate that none was made (*a*). No second reference is allowed for further proof after a cause has undergone a trial by plea and proof; but a second reference may be allowed, where further proof by affidavits has been ordered, and sufficient evidence to satisfy the Court has not been produced upon that order (*b*). Where papers are suppressed by the master, further proof is required from the owners (*c*). The indulgence of further proof is refused, when the party claiming has been guilty of fraud, or unneutral conduct, in the transaction out of which the claim arises (*d*); as where he has attempted to cover

(*w*) *The Hoop*, 1 Rob. 130.

(*x*) *The Carolina*, 1 Rob. 304.

(*y*) *The Fortuna*, 5 Rob. 27.

(*z*) *The Vreede*, 5 Rob. 231.

(*a*) *The Bernon*, 1 Rob. 106; and see the *Magnus*, 1 Rob. 33.

(*b*) *The Magnus*, 1 Rob. 33; *The Bernon*, 1 Rob. 106.

(*c*) *The Polly*, 2 Rob. 362.

(*d*) *The Welvaart*, 1 Rob. 122; *The Jouffrow Anna*, 1 Rob. 125; *The Vrouw Hermina*, 1 Rob. 163.

enemy's property by his claim (*e*), or by holding out a false destination on the outward voyage (*f*), or has shipped goods from one enemy's port to another, with a false destination to a neutral port (*g*); and such a false destination on the outward voyage will preclude further proof of the return cargo (*h*). So where a claimant is guilty of spoliation of papers (*i*).

With regard to further proof by captors, it is to be observed, that plea and proof opens the case to both parties; but further proof by affidavits, to be exhibited on the part of the captor, is only admissible under the special directions of the Court. It is a proper control over the rash and light manner in which claimants may attempt to pick up something like proof on affidavit; but it is not to be exercised, except on special grounds, and only with the leave of the Court (*k*). The Court is not disposed to encourage applications, on the part of the captors, to introduce evidence on an order for further proof. It has seldom been allowed, except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry further. In such cases the Court has allowed it; but when the matter is foreign, and not connected with the original evidence in the cause, it must be under very particular circumstances indeed, that the Court will be induced to accede to such an application; because, if remote suggestions were allowed, the practice of the Court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof, that would be introduced in order to support arbitrary sugges-

(*e*) *The Eenrom*, 2 Rob. 1.

(*f*) *The Calypso*, 2 Rob. 161; *The Rosalie*, 2 Rob. 343; *The Graff Bernstorff*, 3 Rob. 109.

(*g*) *The Mars*, 6 Rob. 79; *The Caroline*, 3 Rob. 75; *The Convenientia*, 4 Rob. 201.

(*h*) *The Nancy*, 3 Rob. 122; *The Rosalie*, 2 Rob. 343.

(*i*) *The Rising Sun*, 2 Rob. 104.

(*k*) *The Adriana*, 1 Rob. 313.

tions (*l*). The act of parliament, which ordains, that if any doubts arise, the Court may direct further proof, has not limited the cause of doubt to evidence actually on board, nor could it with propriety have imposed any such restriction. Though the depositions and formal papers were consistent, the Court itself might possess information that would completely falsify the claim, and could not be expected to proceed to judgment, on the mere formal evidence, in opposition to its conviction, that the whole of what was then stated was false. Therefore, there may be instances, in which the Court has the power of calling for extraneous proof. When a case is perfectly clear, and not liable to any just suspicion, the Court will lean strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiries (*m*). But when the case is not free from objection on the original evidence, it has frequently been allowed. In the case of the *Ronco*, a letter found on board a vessel, not brought in, and transmitted officially to the king's proctor before the capture, and referring circumstantially to the charter party of the prize, was admitted in evidence on the part of the captors (*n*). So, when a vessel was captured almost under the batteries of a blockaded port, the captors were allowed to exhibit affidavits, to shew the real circumstances of the capture (*o*). So in a case of great suspicion, affidavits of indifferent persons, in regard to the conduct and declarations of the master, were admitted (*p*). So, the depositions of the claimant in a former case, in which he was owner and master of the vessel, were admitted, on the part of the captors, to prove his national character (*q*). But to prove

(*l*) *The Sarah*, 3 Rob. 330.

(*m*) *The Romeo*, 6 Rob. 351.

(*n*) *Ibid.*

(*o*) *The Charlotte Christine*, 6 Rob. 101.

(*p*) *The Richmond*, 5 Rob. 330.

(*q*) *The Vriendschap*, 4 Rob. 166.

fraud on the part of the claimant, proof of his fraudulent conduct, as to other vessels of which he was owner, is not admissible (*r*).

In questions purely nautical the Trinity Masters are called in as assessors to the Court, and the Court relies upon their judgment (*s*).

The sixty-third section of the Prize Act provides, that in all cases of condemnation in the High Court of Admiralty, where there is no claimant or appellant before the Court, it shall be lawful for the said Court, at the prayer of the captors, to compel the agents by process of monition and attachment to vest the proceeds of the property condemned in such public securities as the captors shall elect, there to remain and accumulate for the benefit of the parties entitled, till the time of appeal shall be passed, subject nevertheless to the further directions of the Court upon the application of the captors.

By Section LXXI. the Judges of the Admiralty and Vice-Admiralty are empowered to order and enforce the distribution of proceeds after the time of appeal is elapsed; and by Section LXXII. before such time, when the Judge shall certify that the vessel condemned sailed under the flag and pass of the enemy, subject nevertheless to the liability of the captor to answer any appeal that may be instituted thereafter during the time limited by the law for appeals.

Where a monition issued at the suit of the petty officers and crew calling upon the agent to distribute, and the agent's return set forth, that the accounts of another capture made by the same vessel were not settled, and that the captain advised him not to distribute except to the officers, until those accounts should be liquidated. The Court held, that such advice was not proper to be given, nor to be received; and that the agent should not have acted in compliance with it. When

(*r*) *The Convenientia*, 4 Rob. 205.

(*s*) *The Exchange*, Edw. 40.



a prize has become a vested interest, the parties in distribution are entitled to their share; and if the captain makes another seizure he is answerable for the discretion of that act. The Court threw out an opinion that the practice, which was represented to prevail, if discharging unsuccessful seizures by other prizes belonging to the same vessel, cannot be sustained by the Court, except in cases when a general consent to that effect is shewn; and the agent was condemned in the expenses of the application (†).

With respect to appeals, the act provides, section 49, that if any captor or claimant shall not rest satisfied with the sentence or interlocutory decree, having the force of a definitive sentence given or pronounced in the High Court of Admiralty, or in any Court of Admiralty, or Vice-Admiralty, in any of his Majesty's dominions duly authorized to proceed in prize causes, it shall and may be lawful for the party or parties thereby aggrieved to appeal from the said High Court of Admiralty, or Vice-Admiralty, to the commissioners appointed under the great seal of Great Britain for receiving and determining appeals in prize causes; such appeals to be interposed and received in like manner as appeals to the commissioners in prize causes have been usually interposed and received from the said High Court of Admiralty; and good security, to be likewise given by the appellant or appellants that he or they will effectually prosecute such appeal, and also pay such costs as shall be awarded in case the sentence or interlocutory decree having the force of a definitive sentence of such Court of Admiralty or Vice-Admiralty be affirmed, anything in this act contained to the contrary thereof notwithstanding: provided always, that the execution of any definitive sentence, or interlocutory decree having the force of a definitive sentence, appealed from as aforesaid, shall not be suspended by reason of such appeal, save as is hereinafter provided, in case

(†) The Prince Henrick Von Prussen, 6 Rob. 95.

the parties appellates shall give sufficient security, to be approved of by the Court in which the sentence or interlocutory decree shall be given, to restore the ship, vessel, goods, or effects concerning which such sentence or interlocutory decree shall be pronounced, or the full value thereof to the appellants, in case the sentence or interlocutory decree so appealed from shall be reversed,

Section L. That in case any person who was not a party in the first instance in the cause shall intervene in, or interpose an appeal from a sentence or interlocutory decree, having, &c. given or pronounced in any Admiralty Court, such person or his agent shall at the same time enter his claim, otherwise such appeal shall be null and void.

Section LI. And whereas great inconveniences have arisen by reason of appeals in prize causes not being prosecuted in a reasonable time, and from secret appeals and protocols of appeal being entered before a notary public without any notice given to the Court or parties appellate, or their proctors; for remedy thereof be it enacted, that every person being a party or not a party in a prize cause in the High Court of Admiralty in England, or in any Vice-Admiralty Court, and against whom any sentence shall hereafter be given, or any interlocutory decree having the force of a definitive sentence pronounced; and who shall appeal therefrom, shall prosecute such his appeal by taking out the usual inhibition within twelve months after the time such sentence or interlocutory decree shall be given, and that after the expiration of the said term of twelve months without any inhibition having been taken out, no appeal shall be allowed to be prosecuted by any person being a party or not a party in the said High Court of Admiralty or Vice-Admiralty; nor shall any inhibition be granted at the prayer of such person or his proctor; but the said sentence or interlocutory decree shall stand confirmed as to such person: provided nevertheless that it shall be lawful for the Lords Commissioners of Appeals in all cases in which

it shall appear, that a distribution has not taken place to permit an appeal to be prosecuted after the term of twelve months, where upon special cause shewn, they shall deem such permission fit and proper to be given.

Section LII. That in case any appeal shall be interposed from a sentence or interlocutory decree, having the force of a definitive sentence given or pronounced in any Court of Admiralty or Vice-Admiralty, concerning any ship or vessel, or goods or effects which have been or now are, or shall hereafter be seized and taken as prize, that then in such case the Judge of such Court shall and may, at the request costs and charges either of the captor or claimant (or of the claimant only, in case where the privilege is reserved in favour of the claimant by any treaty or treaties subsisting between his Majesty and foreign powers), make an order to have such capture appraised, unless the parties shall otherwise agree upon the value thereof and an inventory to be made, and then take security for the full value thereof accordingly, and thereupon cause such capture to be delivered to the party giving such security, in like manner as is hereinbefore enacted, notwithstanding such appeal: and that if there shall be any difficulty or sufficient objection to giving or taking security the Judge shall, at the request of either of the parties, cause such effects to be entered, landed, and sold by public auction under the care and custody of the proper officers of the customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors; and the money arising from such sale shall be brought into Court, and by the registrar, &c., of the said Court be deposited in the Bank of England, or (in case the captors and claimants shall agree thereto) in some public securities at interest, in the names of the registrar and such trustees as the said captors and claimants shall appoint, and the Court approve: and if such security shall be given by the claimants, then the Judge shall give such captured ship or vessel a pass, under his seal, to prevent

its being again taken by his Majesty's ships in its destined voyage.

Section LIII. provides that appraisements and sales of ships, goods, &c., laden by any ship of war shall be made by agents appointed by the flag-officers, captains, officers and ship's companies; and that an equal number of agents shall be appointed by the flag-officers, by the captains or commanders, by the commissioned and warrant officers, and by the petty officers and the rest of the crew, or the majority of each class respectively. Section LXIV. provides that it shall be lawful for the Judge of the High Court of Admiralty, in all cases wherein any sentence of condemnation pronounced in the said Court is appealed from, at the time of serving the inhibition thereon or at any time thereafter, during the pendency of such appeal, and without prejudice to such appeal, to assign the agent or agents, or other persons in whose hands the proceeds of prize may have come, at the prayer of either party, or of the treasurer of Greenwich Hospital or his deputy, &c., to bring into and leave in the registry the net proceeds of the sales of such prize, deducting therefrom so much as in the discretion of the said Judge shall be requisite to be left in the hands of the agents for the expenses of defending such appeal, &c.

By Section LXV. the Lords Commissioners of Appeals are authorized and empowered, in any case of appeal before them, to order, at their discretion, the proceeds of any prize, the subject of such appeal, or any part thereof, to be paid by the agent or agents for such prize, at the requisition of the captors or claimants, into the Court, to be laid out and disposed of at the discretion of the Court, on any application made for that purpose, either by the captors or claimants.

For the protection of the sureties, it is provided by the 44th Section of the act, that, in case the sentence, or interlocutory decree, having the force of a definitive sentence, shall be finally reversed, after sale of any ship or goods, pursuant to

the directions in this act contained; the net proceeds of such sale (after payment of all expenses attending the same), shall be deemed and taken to be the full value of such ship and goods; and that the party or parties appellate and their securities, shall not be answerable for the value beyond the amount of such net proceeds, unless it shall appear, that such sale was made fraudulently or without due care.

With respect to the claims of joint captors, it is provided by Section 47, that no claim on behalf of any asserted joint capture shall be admitted before condemnation, unless security shall be given at the time of entering the same, that the party shall contribute to the actual captor, his proportion of all expense that shall attend the obtaining the adjudication, as well in the first instance, as upon the appeal; and likewise his proportion of all costs and damages that may be awarded against the actual captor, on account of the seizure and detention; and after final condemnation, no allegation, setting forth such interest, shall be admitted, unless the party shall have previously paid his proportion of all such expenses, as shall have attended the obtaining such final condemnation; and unless he shall have shewn sufficient cause to the Court, why such claim was not asserted at, or before the return of such monition; provided always, that nothing herein contained, shall extend to the asserted interest of any admiral or flag-officer claiming to share in any prize by virtue of his flag.

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## APPENDIX.



(A.)

### FORM OF CERTIFICATE UNDER THE TREATY OF 1661, BETWEEN GREAT BRITAIN AND SWEDEN.

We, N. N., governor, or chief magistrate, or the commissioners of the duties and customs of the city or province of N. [the title or office of the respective government of that place being added] do make known and certify, that on the day of the month of            in the year of            N. N. N., citizens and inhabitants of N., and subjects of his Sacred Royal Majesty of Sweden, or of his Sacred Royal Majesty of Great Britain, personally appeared before us in the city or town of N., in the dominions of his Sacred Royal Majesty of Sweden, or of his Sacred Royal Majesty of Great Britain, [as the case shall happen] and declared to us upon the oath by which they are related and bound to our Most Gracious Sovereign, his Sacred Royal Majesty of Sweden, and to our city, or, to his Sacred Royal Majesty of Great Britain, and to our city, that the ship or vessel called N., of about            lasts or tons, belongs to the port, city, or town of N., in the dominions of N., and that the said ship does rightfully belong to him or other subjects of his Sacred Royal Majesty of

Sweden, or his Sacred Royal Majesty of Great Britain, that she is bound directly from the port of N., to the port of N., laden with the following merchandize, viz. [here shall be specified the goods, with their quantity and quality :—for example, about so many chests, or bales, about so many hogs-heads, &c., according to the quantity and condition of the goods] and affirmed on the oath aforesaid, that the said goods and merchandize belong only to the subjects of his Sacred Royal Majesty of Sweden, or of his Sacred Royal Majesty of Great Britain [or expressing whatever nation they are subjects of] and that N. N. N. declared upon their said oath, that the said goods above specified, and no others, are already put on board, or are to be put on board the above named ship, for the said voyage, and that no part of those goods belongs to any other person whatsoever but those mentioned, and that no goods are disguised or concealed therein by any fictitious name whatsoever, but that the wares above mentioned, are truly and really put on board for the use of the said owners, and no others, and that the captain of the said ship, named N., is a citizen of the city of N. Therefore, whereas, after strict examination by us, [the governor, or chief magistrate, or commissioners of the duties and customs of the city aforesaid] it fully appears, that the said ship or vessel, and the goods on board the same are free, and do truly and really belong to the subjects of his Sacred Royal Majesty of Sweden, or of his Sacred Royal Majesty of Great Britain, or, to the inhabitants of other nations as aforesaid, we do most humbly and earnestly require it of all and singular the powers, by land and sea, kings, princes, republics, and free cities; also of the generals of armies, admirals, commanders, officers, and governors of ports, and all others, to whom the custody of any harbour or sea is committed, which happen to meet this ship in her voyage, or if she chance to fall in among, or pass through their squadrons, or to stay in their harbours, that for the sake of the treaties and friendship which subsist respectively between them, or

whoever are his superiors, and his Sacred Royal Majesty, our Most Gracious Sovereign the King of Sweden, or his Sacred, &c., the King of Great Britain, that they will not only permit the said captain, with the ship N., and the men, goods, and merchandize, to her belonging, to prosecute her voyage freely, without lett or molestation; but also, if he think fit to depart out of the said harbour elsewhere, that they will shew all kind offices to him and his ship, as a subject of his Sacred Royal Majesty of Sweden, or of, &c., as they shall in like manner experience the same from his Sacred Royal Majesty, &c., and from all his ministers and subjects in the like or any other case. In witness whereof, we have taken care, that these presents, signed by our own hands, be sealed with the seal of our city. Given, &c.

## 2. The like under the treaty of 1670 between Great Britain and Denmark.

Charles the Second, by the grace of God King of Great Britain, &c.

Christain the Fifth, by the grace of God King of Denmark and Norway, &c.

Be it known to all and singular to whom these our letters of safe conduct shall be shewn, that                      our subject and citizen of our city of                      hath humbly represented unto us, that the ship called                      of the burthen of                      tons doth belong unto them and others our subjects, and that they are sole owners and proprietors thereof, and is now laden with the goods which are contained in a schedule, which she hath with her from the officers of our customs, and do solely, truly, and really belong to our subjects, or others in neutrality, bound immediately from the port of                      to such other place or places, where she may conveniently trade within, the said goods being not prohibited, nor belonging to either of the parties in hostility, or else find a freight, which the afore-



said                   , our subject having attested by a writing under his hand, and affirmed to be true by oath, under penalty of confiscation of the said goods, we have thought fit to grant him these our letters of safe conduct; and therefore, we do respectfully pray and desire, all governors of countries and seas, kings, princes, commonwealths, and free cities, and more especially the parties now in war, and their commanders, admirals, generals, officers, governors of ports, commanders of ships, captains, freighters, and all others whatsoever, having any jurisdiction by sea, or the custody of any port, whom the ship aforesaid shall chance to meet, or among whose fleet or ships it shall happen to fall, or make stay in these ports, that by virtue of the league and amity, which we have with any king or state, they suffer the said master, with the ship                   persons, things, and all merchandize on board her, not only freely and without molestation, detention, or impediment, to any place whatsoever, to pursue his voyage, but also to afford him all offices of civility, as to our subject, if there shall be occasion; which, on the like or other occasion, we or ours shall be ready to return.

Given the                   day of                   in the year

We the presidents, consul, senators of the city of                   do attest and certify, that on the                   day of                   in the year                   personally before us came and appeared                   citizen and inhabitant of the city or town of                   and under the oath wherein he stands bound to our Sovereign Lord the King, did declare unto us, that the ship or vessel called                   of the burthen of                   tons, doth belong to the port, city, or town of                   in the province of                   and that the said ship doth justly belong to him and others subjects of our said Sovereign Lord, now bound directly from the port of                   laden with goods mentioned in a schedule received from the officers of the customs; and that he hath affirmed under the oath aforesaid, that the forementioned

vessel with her goods and merchandize doth only belong to subjects of his Majesty, and doth carry no goods prohibited, which belong to either of the parties now in war.

In testimony whereof we have caused this certificate to be subscribed by the syndic of our city, and sealed with our seal. Given, &c.

3. The like under the treaty of Utrecht between Great Britain and France.

*Form of passport to be desired of and given by the Lord High Admiral of Great Britain or, &c.*

To all to whom these presents shall come greeting. We High Admiral of Great Britain, &c. [or], we Commissioners for executing the office of High Admiral of Great Britain, &c., do make known and testify by these presents, that A. B. of C. the usual place of his dwelling, master or commander of the ship called D. appeared before us, and declared by solemn oath [or], produced a certificate under the seal of the magistrate, or of the officers of the customs of the town and port of E. dated the day of in the year of our Lord of and concerning the oath made before them, that the said ship and vessel D., burthen tons, whereof he himself is at this time master or commander, doth really and truly belong to the subjects of her Most Serene Majesty our Most Gracious Sovereign. And whereas it would be most acceptable to us, that the said master or commander should be assisted in the affairs, wherein he is justly and honestly employed, we desire you and all and every of you, that wheresoever the said master or commander shall bring his ship and the goods on board thereof, you would cause him to be kindly received, to be civilly treated, and in paying the lawful and accustomed duties and other things, to be admitted to enter, to remain in, to depart out of your ports, rivers, and dominions, and to

enjoy all manner of right, and all kind of navigation, traffic, and commerce in all places, where he shall think it proper and convenient. For which we shall be always most willing and ready to make returns to you in a grateful manner. In witness and confirmation whereof we have signed these presents, and caused our seal to be put thereunto. Given at the            day of the month of            in the year

*Form of the certificate to be given by the magistrate or officers of the customs, &c.*

We, A. B.            magistrate [or] officers of the customs of the town and port of C.            do certify and attest, that on the            day of            in the year of our Lord D. E. of F.            personally appeared before us, and declared by a solemn oath, that the ship or vessel called G.            of about            tons, whereof H. I. of K.            [his usual place of habitation], is master or commander, does rightfully and properly belong to him and others, subjects of her Most Serene Majesty our Most Gracious Sovereign, and to them alone; that she is now bound from the port of L.            to the port of M. laden with goods and merchandizes hereinunder particularly described and enumerated; that is to say, as follows:—

In witness whereof we have signed this certificate, and sealed it with the seal of our office. Given, &c.

*Form of passports which are to be given in the Admiralty of France to, &c.*

Lewis Count of Thoulouse, Admiral of France, to all who shall see these presents, greeting. We make known that we have given leave and permission to            master and commander of the ship called            of the town of burthen            tons, or thereabouts, lying at present in the port and haven of            and bound for            and laden with            after that his ship has been visited, and before sailing he shall make oath before the officers who have the

jurisdiction of maritime affairs, that the said ship belongs to one or more of the subjects of his Majesty, the act whereof shall be put at the end of these presents; as likewise that he will keep and cause to be kept by his crew on board the marine ordinances and regulations, and enter in the proper office a list signed and witnessed, containing the names and surnames, the places of birth and abode of the crew of his ship, and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of the marine, and in every port or haven where he shall enter his ship he shall shew his present leave to the officers and Judges of the marine, and shall give a faithful account to them of what passed and was done during his voyage. And he shall carry the colours, arms, and ensigns of the king and of us during his voyage. In witness whereof we have signed these presents, and put the seal of our arms thereunto, and caused the same to be countersigned by our secretary of the marine at the day of

(Signed) LEWIS COUNT OF THOULOUSE.

and underneath by

***Form of the Act containing the Oath.***

We \_\_\_\_\_ of the Admiralty of \_\_\_\_\_ do certify that  
\_\_\_\_\_ master of the ship named in the above passport, has  
taken the oath mentioned therein. Done at \_\_\_\_\_ the  
day of \_\_\_\_\_

4. The fifth article of the treaty of commerce between Great Britain and Morocco refers to a form of passport, but no form is given in the printed copy of the treaty.

**5. Form of certificate in case of convoy under the maritime convention between Great Britain and Russia, Denmark and Sweden.**

Be it known, that we have given leave and permission to  
 N. of the town or place of N. master or com-  
 mander of the vessel N. belonging to N. of the  
 port of N. burthen tons, or thereabouts, lying  
 at present in the port or haven of N. to sail to N.  
 laden with N. on account of N. after that his  
 vessel shall have been visited before sailing in the usual  
 manner by the officers appointed for that purpose; and the  
 said N. or any other person empowered to take his  
 place, shall be bound to produce in every port or haven where  
 he shall enter with the said vessel, his present leave, and to  
 carry the flag of N. during his voyage.

In testimony whereof, &c.

*Form of Certificates under Dutch Treaty of 1667.*

Form of Certificate to British Ships.

High Admiral of England, to all who shall see  
 these presents, greeting. These are to certify that we have  
 granted leave and permission to master and captain  
 of the ship called of the city of of the  
 burthen of tons or thereabouts, being at present in  
 the port and haven of to go to laden  
 with after search shall have been made of his ship,  
 and he before his departure shall have made oath before the  
 officers that exercise jurisdiction of maritime causes that the  
 said vessel doth belong to one or more of his Majesty's sub-  
 jects, an act whereof shall be put at the bottom of these  
 presents, as also to keep and cause to be kept by those aboard  
 him the orders and rules of the marine, and shall put into the  
 registry a list, signed and certified, containing the names and  
 surnames, the nativity and habitation of the men that are  
 aboard him, and of all that shall embark themselves, whom he  
 may not take on board without the knowledge and permission

of the marine officers; and in every port or haven where he shall enter with his ship shall shew the officers and marine judges this his present license; and having finished his voyage, shall make faithful relation of what hath been done and hath passed during all the time of his said voyage; and shall carry the flags, arms, and colours of his Majesty throughout his whole voyage. In witness whereof we have signed these presents, and caused the seal of our arms to be put thereunto, and the same to be countersigned by our secretary of the marine, the                      day of                      one thousand

(Signed)

and underneath, by  
and sealed with the seal of the arms of the said High Admiral.

*A Form of the Act containing the Oath to be taken by the Master or Captain of the Ship.*

We                      of the Admiralty of                      do certify that                      master of the ship named in the passport above hath taken the oath therein mentioned. Given at the                      day of                      one thousand                      In testimony whereof we have hereunto set our hands.

*The Form of Dutch Certificates.*

To the Most Serene, &c., Emperors, Kings, &c., who shall see these presents. We, burgomasters and governors of the city of                      do certify that                      shipmaster, appearing before us, hath declared by solemn oath, that the ship called                      containing about                      lasts, of which he is at present the master, belongeth to inhabitants of the United Provinces, So help him God: and as we would willingly see the said shipmaster assisted in his just affairs, we do request you and every of you, where the above said master shall arrive with his ship and goods, that you will please to receive him courteously, and use him kindly, admitting him upon

paying the usual dues, tolls, and other customs to enter into, remain in, and pass from your ports, rivers, and territories; and there to trade, deal, and negotiate in any part or place, in such sort and manner as he shall desire: which we shall most readily acknowledge on like occasion. In witness whereof we have caused the seal of our city to be thereunto put.

(B.)

FORM OF CLAIM FOR A SHIP.

*Admiralty Prize Court.*

Graff Von Bernstroff, Johan Frederick Steengerofe, Master.

The claim of Johan Frederick Steengerofe, of Bergen, a subject of his Majesty the King of Denmark, and master of the ship Graff Von Bernstroff, on behalf of Claus Krohn and others, all of Bergen, also subjects of his Majesty the King of Denmark, the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture at the time of the capture thereof by his Majesty's armed cutter, the Constitution, Lieutenant Weston, commander, and brought to Plymouth, for the said ship, her tackle, apparel, and furniture, as the sole property of Danish subjects, and as aforesaid, and for his (the claimant's) private adventure, consisting of nineteen boxes of lemons, laden on board the said ship at the capture aforesaid, and for all such freights, costs, charges, damages, demurrages, and expenses, as have arisen, or shall or may arise by reason of the capture and detention of the said ship.

JOHN FREDERICK STEENGEROFE.

GEORGE THOMPSON, Interpreter.

J. NICHOLL.

(C.)

## STANDING INTERROGATORIES,

*to be administered on behalf of Our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith. To all commanders, masters, officers, mariners and other persons found on board any ships and vessels, which have been, or shall be seized or taken as prize by any of his Majesty's ships or vessels of war, or by merchants' ships or vessels, which have or shall have commissions or letters of marque*

(L. S.) *GEORGE R. and reprisals, concerning such captured ships, vessels, or any goods, wares and merchandize on board the same, examined as witnesses in preparatory, during the present hostilities.*

LET each witness be interrogated to every of the following questions, and their answers to each interrogatory written down.

**I. INTERROGATE.** Where were you born, and where have you lived for these seven years last past? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been a subject, and of what cities or towns have you been admitted a burgher or freeman, and at what time and in what manner were you admitted a burgher or freeman? How long have you



resided there since you were admitted a burgher or freeman, or where have you resided since? What did you pay for your admission? Are you a married man, and if married, where do your wife and family reside?

II. INTERROGATE. ~~W~~ere you present at the time of taking and seizing the ship or her lading, or any of the goods or merchandizes, concerning which you are now examined? Had the ship, concerning which you are now examined, any commission? What, and from whom?

III. INTERROGATE. In what place, latitude, or port, and in what year, month and day, was the ship and goods, concerning which you are now examined, taken and seized? Upon what pretence and for what reasons were they seized? Into what place or port were they carried, and under what colours did the said ship sail? What other colours had you on board, and for what reason had you such other colours? Was any resistance made at the time when the said ship was taken, and if yea, how many guns were fired, and by whom, and by what ship or ships were you taken? Was such vessel a ship of war, or a vessel acting without any commission, as you believe? Were any other, and what ships, in sight at the time of the capture?

IV. INTERROGATE. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of the said ship? Where did such master take possession of her, and at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode? If he has no fixed place of abode, then let him be asked, where was his last place of abode, and where does he

generally reside? How long has he lived there? Where was he born, and of whom is he now a subject? Is he married, if yea, where does his wife and family reside?

V. INTERROGATE. Of what tonnage or burthen is the ship which has been taken? What was the number of mariners, and of what country were the said seamen or mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

VI. INTERROGATE. Had you or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any and what part, share, or interest in the said ship, or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said ship or vessel at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

VII. INTERROGATE. What is the name of the ship? How long has she been so called? Do you know of any other name or names by which she hath been called? If yea, what were they? Had she any paseport or sea-brief on board, and from whom? To what ports and places did she sail during her said voyage before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? Set forth the quality of every cargo the ship has carried to the time of her capture, and what ports such cargoes have been delivered at? From what parts and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture?

VIII. INTERROGATE. What lading did the said ship carry

at the time of her first setting sail in her last voyage, and what particular sort of lading and goods had she on board at the time when she was taken? In what year and in what month was the same put on board? Set forth the different species of the lading and the quantities of each sort.

**IX. INTERROGATE.** Who were the owners of the ship or vessel, concerning which you are now examined, at the time when she was seized? How do you know that they were the owners of the said ship at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject?

**X. INTERROGATE.** Was any bill of sale made, and by whom, to the aforesaid owners of the said ship, and if any such was made, in what month and year? Where, and in the presence of what witnesses, was such bill of sale made? Was any and what engagement entered into concerning the purchase further than what appears upon the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what is become of it?

**XI. INTERROGATE.** Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

**XII. INTERROGATE.** What are the names of the respective laders or owners, or consignees, of the said goods? What countrymen are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your

.

knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any of the said consignees or laders any, and what interest, in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe, that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do and will belong to the same persons, and to none others?

**XIII. INTERROGATE.** How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colourable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

**XIV. INTERROGATE.** Are there, in Great Britain, any bills of lading, invoices, letters or instruments, relating to the ship and goods, concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to this kingdom?

**XV. INTERROGATE.** Was there any charter-party signed for the voyage in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

**XVI. INTERROGATE.** What papers, bills of lading, letters, or other writings, were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown

overboard, destroyed, or cancelled, concealed or attempted to be concealed, and when, and by whom, and who was then present ?

**XVII. INTERROGATE.** Has the ship, concerning which you are now examined, been at any time, and when, seized as prize, and condemned as such ? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned ?

**XVIII. INTERROGATE.** Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined ? If yea, in what manner do you compute such, your loss ? Have you already received any indemnity, satisfaction, or promise of satisfaction, for any part of the damage which you have sustained, or may sustain by this capture and detention, and when, and from whom ?

**XIX. INTERROGATE.** Is the said ship or goods, or any, and what part, insured ? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made ?

**XX. INTERROGATE.** In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom ? Or was the lader to take the chance of the market for the sale of his goods ?

**XXI. INTERROGATE.** Let each witness be interrogated of the growth, produce and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof ?

**XXII. INTERROGATE.** Whether all the said cargo, or any, and what part thereof, was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel or ship, to another? From what, and to what shore, quay, boat, barque, vessel or ship, and when and where was the same so done?

**XXIII. INTERROGATE.** Are there in any country besides Great Britain, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel, concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers or documents, relative to the said ship or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers or documents, and what are the contents?

**XXIV. INTERROGATE.** Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession, or power, do you believe the same now are?

**XXV. INTERROGATE.** Was bulk broken during the voyage in which you were taken, or since the capture of the said ship? And when, and where, by whom, and by whose orders? And for what purpose, and in what manner?

**XXVI. INTERROGATE.** Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers by name? Of what nation, rank, profession, or occupation? Had they any commission? For what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which, of the passengers any and what property

or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers, or mariners, secreted on board, and for what reason were they secreted? Were any of his Britannic Majesty's subjects on board, or secreted or confined at the time of the capture? How long, and why?

**XXVII. INTERROGATE.** Were, and are, all the passports, sea-briefs, charter-parties, bills of sale, invoices and papers, which were found on board entirely true and fair? Or are any of them false or colourable? Do you know of any matter or circumstance to affect their credit? By whom were the passports or sea-briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation of the persons therein described? or were they delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long a time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass or letters of safe conduct? If yea, from whom, and for what business?

**XXVIII. INTERROGATE.** If it should appear that there are in Ireland, or the British American colonies, or in any other place or country, besides Great Britain, any bills of lading, invoices, instruments, or papers relative to the ship and goods, concerning which the witness is now examined; then interrogate, how were they brought into such place or country? In whose possession are they, and do they differ

from any of the papers on board, or in Great Britain or Ireland, or elsewhere, and in what particular do they differ? Have you written or signed any letters or papers, concerning the ship and her cargo? If yea, what was their purport? To whom were they written and sent, and what is become of them?

**XXIX. INTERROGATE.** Towards what port or place was the ship steering her course at the time of her being first pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship papers? Was the ship before, or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship papers? At what distance was she therefrom? Was her course altered at any, and at what time, and to what other port or place, and for what reason?

**XXX. INTERROGATE.** By whom, and to whom hath the said ship been sold or transferred, and how often? At what time and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security, or securities, have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe in your conscience, such sale or transfer has been duly made? And not for the purpose of covering or concealing the real property? Do you verily believe that if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?

**XXXI. INTERROGATE.** What guns were mounted on board the ship, and what arms and ammunition were belonging to



her? Why was she so armed? Were there on board any other guns, mortars, howitzers, balls, shells, handgrenades, muskets, carbines, fuzees, halberts, spontoons, swords, bayonets, locks for muskets, flints, ram-rods, belts, cartridges, cartridge-boxes, pouches, gunpowder, salt-petre, nitre, camp equipage, military tools, uniforms, soldiers clothing or accoutrements, or any sort of warlike or naval stores? Were any of such warlike or naval stores, or things, thrown overboard, to prevent suspicion at the time of the capture? And were, and are any such warlike stores, before described, concealed on board under the name merchandize, or any other colourable appellation, in the ship papers? If yea, what are the marks on the casks, bails and packages, in which they were concealed? Are any of the before named articles, and which, for the sole use of any fortress or garrison in the port or place to which such ship was destined? Do you know, or have you heard of any ordinance, placart, or law existing, in such kingdom or state, forbidding the exportation of the same by private persons without license? Were such warlike or naval stores put on board by any public authority? When and where were they put on board?

XXXII. INTERROGATE. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined, at the time of the capture?

### ADDITIONAL INTERROGATORIES.

I. INTERROGATE. Did the said ship, on the voyage in which she was captured, or on, or during any, and what former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels? If yea, inter-

rogate for what reason or purpose did she sail under such convoy? Of what force was or were such convoying ship or ships? And to what state or country did such ship or ships belong? What instructions or directions had you, or did you receive on each and every of such voyages, when under convoy, respecting your sailing or keeping in company with such armed or convoying ship or ships; and from whom did you receive such instructions or directions? Had you any and what instructions or directions, and from whom, for resisting or endeavouring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your ship's documents and papers? Or any and what other papers, that might be, or were put on board your said ship? If yea, interrogate particularly as to the tenor of such instructions, and all particulars relating thereto? Let the witness be asked if he is in possession of such instructions, or copies thereof, and, if yea, let him be directed to leave the same with the examiner, to be annexed to his deposition.

II. INTERROGATE. Did the said ship, during the voyage in which she was captured, or on doing any and what former voyage or voyages, sail to or attempt to enter any port under blockade by the arms or forces of any, and which of the belligerent powers? If yea, when did you first learn or hear of such port being so blockaded, and were you at any and what time, and by whom warned not to proceed to, or to attempt to enter such blockaded port? What conversation or other communication passed thereon? And what course did you pursue upon, and after, being so warned off?

(D.)

Whereas it hath been represented to us, by our commissioners for executing the office of Lord High Admiral, that it

will be productive of beneficial effects to the service, if instead of the three-eighth parts of the neat produce of prizes which have hitherto been granted to the captains and flag officers serving in our fleet, two-eighth parts only shall be allotted to them, and the remaining eighth part distributed amongst the petty officers, seamen, and marines, in addition to their present shares; we do therefore, by and with the advice of our privy council, think fit to issue this our royal proclamation, hereby revoking our several proclamations heretofore issued, and now in force, concerning the distribution of prizes taken by our fleets and ships, and by all other ships and vessels that are or shall be commissioned by letters of marque or general reprisals against the ships, goods, and subjects of any of the countries with which we are at war: provided always, that the distribution hereinafter made shall not be construed to affect any prizes which have been captured before the day of the date of this our royal proclamation, nor any prizes which shall be captured after that day, and which shall be condemned in any of our Courts of Vice-Admiralty before notice of this our royal proclamation shall have been received by the Court of Vice-Admiralty in which such condemnation shall pass; and we do hereby declare that the produce of all such prizes as shall have been captured before the day of the date of this our royal proclamation, or shall be captured after that day, and shall be condemned in any of our Courts of Vice-Admiralty antecedent to the notice of this our royal proclamation having been received in such Court, shall continue to be distributed in the proportions directed by our said former proclamations; and we do now make known to all our loving subjects, and all others whom it may concern, by this our royal proclamation, by and with the consent of our privy council, that our will and pleasure is, that the neat produce of all prizes taken, the right whereof is inherent in us, and our crown, be given to the taker (save and except the produce of such prizes as are or shall be taken by ships or vessels belonging to, or hired by, or

in the service of our commissioners of customs or excise, the disposition of which we reserve to our further pleasure; and also save and except as hereinafter mentioned), but subject to the payment of all such or the like customs and duties as the same are now, or would have been liable to, if the same were or might have been imported as merchandize; and that the same may be so given in the proportion and manner hereinafter set forth; that is to say,

That all prizes taken by ships and vessels having commissions of letters of marque and reprisals (save and except such prizes as are or shall be taken by the ships or vessels belonging to, or hired by, or in the service of our commissioners aforesaid) may be sold and disposed of by the merchants, owners, fitters, and others to whom such letters of marque and reprisals are granted, for their own use and benefit after final adjudication, and not before.

And we do hereby further order and direct, that the neat produce of all prizes which are or shall be taken by any of our ships or vessels of war (save and except when they shall be acting on any conjunct expedition with our army, in which case we reserve to ourselves the division and distribution of all prize and booty taken; and also save and except as hereinafter mentioned), shall be for the entire benefit and encouragement of our flag officers, captains, commanders, and other commissioned officers in our pay, and of the seamen, marines, and soldiers on board our said ships and vessels at the time of the capture; and that such prizes may be lawfully sold and disposed of by them and their agents, after the same shall have been to us finally adjudged lawful prize, and not otherwise.

The distribution shall be made as follows:—the whole of the neat produce being first divided into eight equal parts.

The captain or captains of any of our said ships or vessels

of war, or officer commanding such ship or vessel who shall be actually on board at the taking of any prize, shall have two-eighth parts; but in case any such prize shall be taken by any of our ships or vessels of war, under the command of a flag or flags, the flag officer or officers being actually on board, or directing and assisting in the capture, shall have one-third of the said two-eighth parts; the said one-third of such two-eighth parts to be paid to such flag or flag officers, in such proportions and subject to such regulations as are hereinafter mentioned.

The sea lieutenants, captains of marines, and land forces, and master on board shall have one-eighth part, to be equally divided amongst them: but every physician appointed, or hereafter to be appointed to a fleet or squadron of our ships of war, shall, in the distribution of prizes which may hereafter be taken by the ships in which he shall serve, or in which such ship's company shall be entitled to share, be classed with the before mentioned officers with respect to one-eighth part, and be allowed to share equally with them: provided such physician be actually on board at the time of taking such prizes.

The lieutenants and quartermasters of marines, and lieutenants, ensigns, and quartermasters of land forces, secretaries of admirals or of commodores with captains under them, second masters of line-of-battle ships, surgeons, chaplains, pursers, gunners, boatswains, carpenters, master's mates, and pilots on board, shall have one-eighth part, to be equally divided amongst them.

The other four-eighth parts of the prize to be divided into shares, and distributed to the persons composing the remaining part of the crew in the following proportions; viz., to the first class of petty officers, namely, the midshipmen, surgeon's assistants, secretaries' clerks, captain's clerks, schoolmasters, masters at arms, captain's coxswains, gunner's mates, yeomen of the powder room, boatswain's mates, yeomen of the sheets,

carpenter's mates, quartermasters, quartermaster's mates, ships' corporals, captains of the forecastle, master sailmakers, master caulkers, master ropemakers, armourers, serjeants of marines, and of land forces, four and a half shares each.

To the second class of petty officers; viz. midshipmen, ordinary captains of the foretop, captains of the maintop, captains of the after guard, captains of the mast, sailmaker's mates, caulkers' mates, armourer's mates, ship's cook, corporals of marines and of land forces, three shares each.

The quarter gunners, carpenter's crew, sailmaker's crew, coxswain's mates, yeomen of the boatswain's store-room, gun-smiths, coopers, trumpeters, able seamen, ordinary seamen, drummers, private marines, and other soldiers, if doing duty on board in lieu of marines, one and a half share each.

The landmen, admiral's domestics, and all other ratings not above enumerated, together with all passengers and other persons borne as supernumeraries, and doing duty and assisting on board, one share each, excepting officers acting by order, who are to receive the share of that rank in which they shall be acting.

And young gentlemen volunteers by order, and the boys of every description, half a share each.

And we do hereby further order, that in the case of cutters, schooners, brigs, and other armed vessels commanded by lieutenants the distribution shall be as follows: first, that the share of such lieutenants shall be two-eighth parts of the prize, unless such lieutenants shall be under the command of a flag officer or officers, in which case the flag officer or officers shall have one-third of the said two-eighths to be divided among such flag officer or officers, in the same manner as herein directed in the case of captains serving under flag officers.

Secondly, we direct that the share of the sub-lieutenant, master, and pilot shall be one-eighth; the said eighth, if there

be all three such persons on board, to be divided into four parts, two parts to be taken by the sub-lieutenant, one part by the master, and one part by the pilot; if there be only two such persons on board, then the eighth to be divided into three parts, of which two-thirds shall go to the person second in command, and one-third to the other person; if there be only a sub-lieutenant or a master and no pilot, then the sub-lieutenant or master to take the whole eighth; if there be only a pilot, then such pilot to have one-half of the eighth, and the other half to go to Greenwich Hospital.

Thirdly, that the share of the surgeon or surgeon's assistant (where there is no surgeon), midshipmen, clerk, and steward shall be one-eighth.

Fourthly, that the remaining four-eighths shall be divided into shares, and distributed to the other part of the crew, in the following proportions; viz. the gunners, boatswains, and carpenter's mates, yeomen of the sheets, sail-maker, quartermaster, and quartermaster's mates, and serjeant of marines, to receive four and a half shares each.

The corporals of marines, three shares each.

The able seamen, ordinary seamen, and marines, one and a half share each.

The landmen, together with passengers and other persons borne as supernumeraries, doing duty and assisting on board, to receive one share each.

Boys of all descriptions, half a share each.

But it is our intention, nevertheless, that the above distribution shall only extend to such captures as shall be made by any cutter, schooner, brig, or armed vessel, without any of our ships or vessels of war being present, or within sight of, and adding to the encouragement of the captors, and terror of the enemy; but in case any of our ships or vessels of war shall be present or in sight, that then the officers, pilots, petty officers, and men on board such cutters, schooners, brigs, or armed vessels, shall share in the same proportion as is allowed

to persons of the like rank and denomination on board of our ships and vessels of war, the sub-lieutenant and master to be considered as warrant officers; and such cutters, schooners, brigs, or armed vessels shall not, in respect to such captures, convey any interest or share to the flag officer or officers under whose orders such cutters, schooners, brigs, and armed vessels may happen to be.

And whereas it is judged expedient, during the present hostilities, to hire into our service armed vessels to be employed as cruisers against the enemy, which vessels are the property of, and their masters and crews are paid by the owners of whom they are hired, although several of them are commanded by our commissioned officers in our pay: it is our further will and pleasure, that the neat produce of all prizes taken by such hired armed vessels (except as hereinafter mentioned) shall be for the benefit of our commissioned officers in our pay, and of the masters and crews on board the said hired armed vessels at the time of the capture, and that such prizes may be lawfully sold and disposed of by them and their agents, after the same shall have been to us finally adjudged lawful prize, and not otherwise; the distribution whereof shall be as follows:

The whole of the neat produce being divided into eight equal parts, our officer commanding any hired armed vessel who shall be actually on board at the taking of any prize, shall have two-eighths; but in case such hired armed vessel shall be under the command of a flag or flags, the flag officer or officers being actually on board, or directing or assisting in the capture, shall have one-third of the said two-eighth parts, the said one-third of the two-eighth parts to be paid to such flag or flag officers, in such proportions, and subject to such regulations as are hereinafter mentioned. In case there be acting on board such hired armed vessel, besides our officer commanding the same, one or more of our commissioned sea lieutenants in our pay, such lieutenant or lieutenants shall take one-



eighth; one-eighth shall belong to the master and mate, of which the master shall take two-thirds and the mate one-third; but in case there shall be acting on board such hired armed vessel one or more midshipmen, in that case the master shall take one-half of the eighth, and the other half shall be divided equally between the mate and midshipmen; the remaining four-eighth parts shall belong to and being divided into shares, be distributed among the other petty officers, men, and boys, in the same proportion as hereinbefore directed with respect to the division of prize money in our ships of war. And in the case of prizes taken by any hired armed vessel not commanded by any of our commissioned officers, one-eighth shall belong to the flag officers, to be divided as aforesaid, in case such hired armed vessel shall be under the command of a flag: one-eighth shall belong to the master and mate, of which the master shall take two-thirds and the mate one-third; four-eighths shall belong to and be divided among the petty officers and crew in manner aforesaid. The surplus, the distribution of which is not herein directed, shall remain at our disposal, and if not disposed of within a year after final adjudication, the same shall belong and be paid to Greenwich Hospital.

And in the case of prizes taken jointly by any of our ships of war and any hired armed vessel, our commissioned officer or officers on board such hired armed vessel shall share with our commissioned officer or officers of the same rank on board our ship or ships of war, being joint captors; the master of such hired armed vessel shall share with the warrant officers; the mate of such hired armed vessel with the first class of petty officers; and the seamen, landmen and boys of such hired armed vessel with persons of the same description on board our said ship or ships of war; save and except that in case such hired armed vessel shall be commanded by one of our commissioned officers, having the rank of master and commander, and there shall be none of our lieutenants on

board, or in case such hired armed vessel shall be commanded by the master, in both those cases the master of such hired armed vessel shall share with the lieutenants of our ships of war, and the mate with the warrant officers; and in case any difficulty shall arise in respect to the said distribution, not herein sufficiently provided for, the same shall be referred to our Lords Commissioners of the Admiralty, whose direction thereupon shall be final, and have the same force and effect as if herein inserted.

Provided that if any officer being on board any of our ships of war, at the time of taking any prize, shall have more commissions or offices than one, such officer shall be entitled only to the share or shares of the prizes which, according to the abovementioned distribution, shall belong to his superior commission or office.

Provided also, that in all prizes taken by any of our squadrons, ships, or vessels, while acting in conjunction with any squadron, ship, or vessel, of any other power that may be in alliance with us, a share of such prizes shall be set apart, and be at our further disposal, equal to that share which the flag and other officers and crews of such squadron, ships, or vessels, would have been entitled to if they had belonged to us.

And we do hereby strictly enjoin all commanders of our ships and vessels of war taking any prize, to transmit as soon as may be, or cause to be transmitted to the commissioners of our navy, a true list of the names of all the officers, seamen, marines, soldiers, and others who were actually on board our ships and vessels of war under their command at the time of the capture; which list shall contain the quality of the service of each person on board, together with the description of the men, taken from the description books of the capturing ship or ships, and their several ratings; and be subscribed by the captain or commanding officer, and three or more of the chief officers on board. And we do hereby require and direct the

commissioners of our navy, or any three or more of them, to examine, or cause to be examined, such lists by the muster books of such ships and vessels of war and lists annexed thereto, to see that such lists do agree with the said muster books and annexed lists, as to the names, qualities, or ratings of the officers, seamen, marines, soldiers, and others belonging to such ships and vessels of war; and upon request, forthwith to grant a certificate of the truth of any list transmitted to them, to the agents nominated and appointed by the captors to take care and dispose of such prize; and also upon application to them (the said commissioners) to give, or cause to be given, to the said agents, all such lists from the muster books of any ships of war and annexed lists, as the said agents shall find requisite for their direction in paying the produce of such prizes; and otherwise to be aiding and assisting to the said agents, in all such matters as shall be necessary.

We do hereby further will and direct, that the following regulations shall be observed concerning the one-third part of the two-eighths hereinbefore mentioned, to be granted to the flag or flag officers, who shall actually be on board at the taking of any prize, or shall be directing or assisting therein.

First, that a captain of a ship shall be deemed to be under the command of a flag, when he shall actually have received some order directly from, or be acting in execution of some order issued by a flag officer; and in the event of his being directed to join a flag officer on any station, he shall be deemed to be under the command of such flag officer from the time that he arrives within the limits of the station, and shall be considered to be under the command of the flag officer of such station, until such captain shall have received some order directly from, or be acting in execution of some order issued by some other flag officer, or the Lords Commissioners of the Admiralty.

Secondly, that a flag officer commander-in-chief, when there

is but one flag officer upon service, shall have to his own use the one-third part of the said two-eighths of the prizes taken by ships and vessels under his command.

Thirdly, that a flag officer sent to command on any station, shall have a right to share as commander-in-chief for all prizes taken by ships or vessels employed there from the time he arrives within the limits of such station; but if a junior flag officer be sent to relieve a senior, he shall not be entitled to share as commander-in-chief in any prizes taken by the squadron, until the command shall be resigned to him, but shall share only as a junior flag officer until he assumes the command.

Fourthly, that a commander-in-chief or other flag officer, appointed or belonging to any station, and passing through or into any other station, shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a flag officer of any other station, or under Admiralty orders.

Fifthly, that when an inferior flag officer is sent to reinforce a superior flag officer on any station, the superior flag officer shall have no right to any share of prizes taken by the inferior flag officer, before the inferior flag officer shall arrive within the limits of the station, or shall actually receive some order directly from him, or be acting in execution of some order issued by him. And such inferior flag officer shall be entitled to his proportion of all captures made by the squadron which he is sent to reinforce, from the time he shall arrive within the limits of the command of such superior flag officer.

Sixthly, that a chief flag officer quitting a station either to return home, or to assume another command, or otherwise, except upon some particular urgent service, with the intention of returning to the station as soon as such service is performed,

shall have no share of prizes taken by the ships or vessels left behind, after he shall have surrendered the command to another flag officer appointed by the Admiralty to be commander-in-chief of such station; or after he shall have passed the limits of the station, in the event of his leaving the command without being superseded.

Seventhly, that an inferior flag officer quitting a station, except when detached by orders from his commander-in-chief out of the limits thereof, upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the flag officers remaining on the station shall have no share of the prizes taken by such inferior flag officer, or by the ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid.

Eighthly, that when vessels under the command of a flag, which belong to separate stations, shall happen to be joint captors, the captain of each ship shall pay one-third of the share, to which he is entitled, to the flag officers of the station to which he belongs; but the captains of vessels under Admiralty orders, being joint captors with other vessels under a flag, shall retain the whole of their share.

Ninthly, that if a flag officer is sent to command in the out ports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed, or shall sail from that port by order from the Admiralty.

Tenthly, that when more flag officers than one serve together, the one-third part of the two-eighth parts of the prizes taken by any ships or vessels of the fleet or squadron, shall be divided in the following proportions; videlicet, if there be but two flag officers, the chief shall have two-third parts of the said third of two-eighths, and the other shall have the

remaining third part: but if the number of flag officers be more than two, the chief shall have only one-half, and the other half shall be equally divided among the junior flag officers.

Eleventhly, that commodores with captains under them, shall be esteemed as flag officers with respect to the one-third of the two-eighth parts of prizes taken, whether commanding in chief or serving under command.

Twelfthly, that the first captain to the admiral and commander-in-chief of our fleet, and also the first captain to our flag officer appointed or hereafter to be appointed to command a fleet or squadron of ten ships of the line-of-battle, or upwards, shall be deemed and taken to be a flag officer, and shall be entitled to a part or share of prizes as the junior flag officer of such fleet or squadron.

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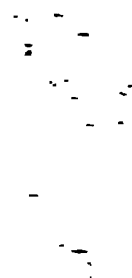
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The RIGHTS OF EUROPEAN STATES under Subsisting Treaties.

The ANATOMY OF SCEPTICISM; or an Attempt towards a Vindication of REASON, FAITH, and CONSCIENCE, from the Cavils of BERKELEY, HUME, and PALEY.

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the 1990s, the number of people in the UK who are employed in the public sector has increased by 1.5 million, from 2.5 million in 1980 to 4 million in 1995. The public sector has also become an important employer of women, with 5.5 million women employed in the public sector in 1995, compared with 4.5 million in 1980.

There are a number of reasons why the public sector has become an important employer of women. One reason is that the public sector has a high proportion of women in its workforce. In 1995, 88% of the public sector workforce were women, compared with 78% in 1980. This is due to a number of factors, including the fact that the public sector has a high proportion of jobs that are traditionally held by women, such as teaching, nursing, and social work.

Another reason why the public sector has become an important employer of women is that it has a high proportion of jobs that are part-time or flexible. In 1995, 22% of the public sector workforce were employed on part-time or flexible contracts, compared with 12% in 1980.

There are a number of reasons why the public sector has a high proportion of part-time or flexible jobs. One reason is that the public sector has a high proportion of jobs that are traditionally held by women, such as teaching, nursing, and social work. These jobs often have a high proportion of part-time or flexible contracts.

Another reason why the public sector has a high proportion of part-time or flexible jobs is that it has a high proportion of jobs that are seasonal or temporary. In 1995, 12% of the public sector workforce were employed on seasonal or temporary contracts, compared with 5% in 1980.

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